Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

CCA ASSOCIATES,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Pursuant to a regulatory agreement with the Department of Housing and Urban Development ("HUD"), Petitioner agreed to maintain and operate an apartment complex as low-income housing for as long as a government-insured, 40-year mortgage on the property remained outstanding. HUD regulations, as well as contracts entered into among Petitioner, the Federal Government, and the lender, provided Petitioner with the right to prepay this government-insured mortgage after 20 years and thereafter regain complete control of the property. In response to concerns that owners participating in these HUD programs would prepay their government-insured mortgages and cease providing low-income housing, Congress outlawed prepayment of government-insured mortgages, including Petitioner's government-insured mortgage, by enacting the Emergency Low Income Housing Preservation Act of 1987 and later the Low-Income Housing Preservation and Resident Homeownership Act of 1990, thereby requiring Petitioner to house low-income tenants for an additional 20-year period. Against that background, the question presented is:

Whether the Emergency Low Income Housing Preservation Act of 1987 and the Low-Income Housing Preservation and Resident Homeownership Act of 1990 effected a taking of Petitioner's property without just compensation, in violation of the Fifth Amendment of the Constitution.

RULE 29.6 STATEMENT

Petitioner CCA Associates is a general partnership consisting of Ernest B. Norman, III, John H. Norman, Margaret H. Norman, and the Ernest B. Norman Jr. and Emma Couret Norman Grandchildren's Trust. No company has an ownership interest in Petitioner.

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BRIEF OF PETITIONER CCA ASSOCIATES FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Federal Circuit's decision in this case is unpublished. *See* Appendix to Petition for a Writ of Certiorari ("Appendix" or "App.") at 1a-3a. The sole opinion upon which the Federal Circuit based its ruling, *Cienega Gardens v. United States* (referred to herein as "*Cienega X*"), is available at 503 F.3d 1266 and is reproduced in the Appendix. App. 95a-149a. The opinion of the Court of Federal Claims is reported at 75 Fed. Cl. 170. App. 4a-94a.

JURISDICTION

The Federal Circuit entered judgment on July 21, 2008. App. 1a-3a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix reproduces the relevant text of Pub. L. No. 100-242, 101 Stat. 1815 (codified at 12 U.S.C. § 1715*l* note); Pub. L. No. 101-625, 104 Stat. 4079 (codified at 12 U.S.C. § 4101 et seq.); and the Fifth Amendment of the United States Constitution. App. 151a-162a, 163a-205a, 150a.

STATEMENT OF THE CASE

This petition concerns the Norman Family's 1971 agreement with the Department of Housing and Urban Development ("HUD") to provide low-income housing in metropolitan New Orleans for a period of

20 years and the government's decision to renege on that agreement and to force the Norman Family to house low-income, HUD-approved tenants for an additional 20 years. The government obtained this housing by legislative fiat, not additional consideration, when Congress, concerned about a national shortage of low-income housing units, confiscated the Norman Family's contractual right to exit the HUD program. This confiscation and the government's failure to provide just compensation for the taking are at issue here.

The Federal Housing Programs And The Norman Family's Agreement With HUD

The Federal Government historically encouraged the creation of low-income housing units by supporting non-profit organizations and public housing authorities. However, in the 1960s, Congress adopted a different approach: involve the private sector. In this respect, Congress authorized HUD, *inter alia*, to provide mortgage insurance and interest-rate subsidies to private investors who agreed to construct and operate low- and/or moderate-income housing units. *See* Amendments to National Housing Act, Pub. L. No 87-70, 75 Stat. 149 (1961); Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476.

Ernest B. Norman, Jr. and J. Robert Norman (the "Norman Brothers"), the predecessors-in-interest to Petitioner CCA Associates ("CCA" or "Norman Family"), agreed to participate in this new HUD program at the urging of HUD agents. App. 57a. In pressing the Norman Brothers to invest in low-income housing and thereby to accept years of minimal returns, the HUD representatives touted

the program's so-called "prepayment right," discussed *infra* at 5-7, which effectively limited the duration of use restrictions and minimal returns on the property to a 20-year term. Thus, the property would be subject to HUD regulations, restrictions, and oversight for 20 years; after 20 years, the Norman Brothers could exit the HUD program and operate the property however they saw fit, including by charging market rents.

The Norman Brothers thus agreed to construct and operate as low-income housing a 104-unit apartment complex in West Metairie, Louisiana, known as Chateau Cleary Apartments ("Chateau Cleary"). App. 24a-25a, 57a-58a. For its part, HUD agreed to provide the Norman Brothers with mortgage insurance, which facilitated a low-interest, 40-year mortgage in favor of the Norman Brothers. App. 25a-26a. Several interlocking documents evidenced this agreement, including: (i) a regulatory agreement between the Norman Brothers and HUD, (ii) a mortgage between the Norman Brothers and a lending institution, and (iii) a promissory note between the Norman Brothers and the lender, which was endorsed by HUD. App. 25a. HUD's endorsement of the note provided the contracted-for mortgage insurance.

The regulatory agreement between the Norman Brothers and HUD sharply restricted the Norman Brothers' use of the property and bound the Norman Brothers for the length of the mortgage (ostensibly 40 years). App. 8a. *Inter alia*, the regulatory agreement:

- limited the occupancy of Chateau Cleary to low- or moderate-income families;

- provided that all rents had to be approved by HUD;
- required that Chateau Cleary be managed "in a manner satisfactory to [HUD]";
- required HUD approval for any conveyance of the property;
- required the Norman Brothers to submit audits to HUD and to furnish annual financial reports to HUD; and
- limited the Norman Brothers' annual return to 6% of their initial equity investment.

App. 8a; *see also* Joint Appendix filed in *CCA Assocs. v. United States*, No. 2007-5094 (Fed. Cir.) ("JA") at 611-616.

The Norman Brothers executed the transaction documents on November 7, 1969. However, the Norman Brothers later requested, and HUD approved, an increase in the mortgage amount. The Norman Brothers therefore signed a second secured note for $1,699,500.00 on May 17, 1971. The second mortgage incorporated by reference the 1969 Regulatory Agreement. App. 27a.

With the approval of HUD, the Norman Brothers later transferred their interests in the property to Petitioner CCA, a general partnership whose partners at the time included Ernest B. Norman, Jr., the children of Ernest B. Norman, Jr., and a trust for the grandchildren of Ernest B. Norman, Jr. App. 27a-28a. CCA assumed the Chateau Cleary mortgage and agreed to be bound by the terms of the regulatory agreement. App. 28a. To this day, the Norman Family, through CCA, owns and operates Chateau Cleary.

The Prepayment Right

The regulatory agreement's use restrictions, including the requirement that the Norman Family house HUD-approved tenants at HUD-approved rents, applied for as long as the mortgage remained outstanding. App. 54a, 57a. Thus, the moment that the Norman Family extinguished the debt owed on Chateau Cleary was the moment that the Family could convey, lease, tear down, or remodel Chateau Cleary or, alternatively, rent the apartment units at market rates. That moment was May 17, 1991, or 20 years after execution of the mortgage and note, because the Norman Family enjoyed an unfettered right to prepay the mortgage after 20 years. App. 77a.

In this respect, both the 1969 and 1971 notes endorsed by HUD include express language guaranteeing the prepayment right: "a maker which is a limited dividend mortgagor may prepay without [HUD] approval after twenty (20) years from the date of final endorsement of this note by [HUD]."[1] App. 26a, n.15. The same prepayment right was embodied in HUD's regulations: The "mortgage indebtedness may be prepaid in full and the Commissioner's controls terminated without the prior consent of the Commissioner where . . . the prepayment occurs after the expiration of 20 years from the date of final insurance endorsement of the mortgage . . . ." 24 C.F.R. § 236.30 (1970); *accord* 24 C.F.R. § 221.524(a)(1)(ii) (1970); *Cienega Gardens v.*

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[1] HUD regulations defined a "limited dividend mortgagor" to include the Norman Brothers. App. 10a, n.5; *see generally* 24 C.F.R. § 221.510(c) (1971).

United States, 331 F.3d 1319, 1330 (Fed. Cir. 2003) ("Owners had unequivocal contractual rights after twenty years to prepay their mortgages[.]"); *cf. Franconia Assocs. v. United States*, 536 U.S. 129, 143 (2002) (ELIHPA repudiated prepayment right).

HUD advertised and touted this prepayment right in negotiations with the Norman Brothers, App. 57a, and the prepayment right drove the Norman Brothers' decision to proceed with the Chateau Cleary project, App. 57a-58a. The Norman Brothers were looking for long-term investment potential, and Chateau Cleary had that long-term potential. The land was located adjacent to Interstate 10 and squarely in the path of anticipated future development in the New Orleans metropolitan area. App. 57a-58a. The Norman Brothers thus paid a premium for land in a growing middle class neighborhood that had the potential to yield substantial rents in the long term.

In fact, the development toward (and beyond) Chateau Cleary occurred just as the Norman Brothers had expected. By 1991, West Metairie had the benefit of two large, popular shopping malls, one of the area's premier medical complexes, good public schools, low crime, a new regional library, easy access to Interstate 10, and proximity to downtown New Orleans. App. 25a, 61a.

And the Family stood ready to benefit from the Norman Brothers' foresight of some 20 years prior. Part and parcel of the Norman Brothers' strategy was to build a quality project and maintain it well such that the unit would be ideally suited for conversion to market-rate apartments in 1991. App. 57a. In line with this strategy, the Norman Brothers themselves constructed Chateau Cleary to last for

the long term, and they maintained the building and apartment units in fine condition. App. 61a. Chateau Cleary consistently received superior ratings during HUD-required inspections and was praised as being "a model complex" by HUD's own inspectors. JA 1, 796. Well into its fourth decade of operation, Chateau Cleary sustained minimal physical damage from Hurricane Katrina in September 2005 – a testament to the quality of its construction and maintenance. App. 61a.

That the Norman Brothers' strategy looked ahead to achieve substantial economic gains after 20 years is further confirmed by their decision not to syndicate the ownership of Chateau Cleary (unlike many other developers of HUD properties, *see* App. 138a-139a) and to keep ownership of Chateau Cleary in the Norman Family. Syndication would have meant relinquishing most of the ownership in the property and sacrificing the upside benefit the Family expected to achieve upon prepayment. JA 969.

ELIHPA And LIHPRHA

The Norman Family satisfied its end of the bargain. The government did not. When Congress believed in the late 1980s that hundreds of thousands of low-income housing units might be lost through mortgage prepayments, Congress simply outlawed prepayment rather than fund new construction projects or provide payment vouchers to tenants. The Emergency Low Income Housing Preservation Act of 1987 ("ELIHPA"),[2] App. 151a-

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[2] Pub. L. No. 100-242, 101 Stat. 1815 (codified at 12 U.S.C. § 1715*l* note).

162a, initially imposed a two-year moratorium on prepayment. The Low-Income Housing Preservation and Resident Homeownership Act of 1990 ("LIHPRHA"),[3] App. 163a-205a (excerpts), made the moratorium on prepayment permanent.

The decision to confiscate the Norman Family's and other property owners' right to prepay was not inadvertent. Congress consciously made the decision to redress a societal need on the backs of a subset of property owners, i.e., those owners who had already dedicated their properties to low-income housing for 20 years. Thus, Senator Armstrong observed with irony that HUD had "enter[ed] into contracts with owners and developers" and that the owners "probably had the mistaken notion that the Federal Government was going to honor its word." 136 Cong. Rec. 26,382-83 (1990). Senator D'Amato admitted that the legislation penalized "[o]wners of projects, who have lived up to a 20-year agreement with the Federal Government." 133 Cong. Rec. 22,209 (1987). Senator Heflin acknowledged that "unilaterally abrogating a contract, which has been adhered to by one party for 20 years, flies in the face of the law." 136 Cong. Rec. 26,372 (1990). And Representative Joseph Kennedy justified the legislation by explaining that "some fine print allowing prepayment" should not defeat the goal of providing low-income housing. *Preservation and the Loss of Subsidized Housing Stock*, Hearing Before the Subcomm. on Housing and Community Dev. of the

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[3] Pub. L. No. 101-625, 104 Stat. 4079 (codified at 12 U.S.C. § 4101 et seq.).

H. Comm. on Banking, Finance and Urban Affairs (Feb. 28, 1990) at 6.

LIHPRHA thus left the Norman Family with three options as of May 17, 1991, the date on which the Family would have prepaid but for Congress' decision to eliminate that right. *First*, the Norman Family could do nothing and therefore remain bound by the regulatory agreement and use restrictions embodied therein for an additional 20 years. The regulatory agreement limited the Norman Family to an annual return of 6% of the *original* equity in the project, or $12,952. App. 8a, 27a. By 1991 this yearly dividend yielded a 1.6% rate-of-return on actual equity (i.e., the equity after 20 years of mortgage payments and property appreciation in a fast growing and prosperous area of metropolitan New Orleans), a more than 81% reduction in the return on equity the Norman Family could have earned but for LIHPRHA. App. 73a.

Second, the Norman Family could attempt to sell Chateau Cleary through a three-year, HUD-regulated process to a HUD-approved purchaser (provided the purchaser agreed to maintain the low-income affordability restrictions for the remaining useful life of Chateau Cleary). App. 19a-20a; JA 978. However, the Norman Family would continue to receive, at most, only the 1.6% return on equity during this three-year process (or $12,952 annually). App. 27a. And the end result, assuming a purchaser could be found and Congress appropriated the funds needed to subsidize the transaction, would be a sale which – according to the government's own witness at trial – lacked the indicia of a fair market transaction. App. 53a, n.26.

Third, the Norman Family could attempt to enter into a so-called "use agreement" with HUD whereby, after another three-year bureaucratic process, JA 978,[4] (during which the Norman Family would receive, at most, only the minimal annual return of $12,952), HUD would provide financial "incentives" to the Norman Family in exchange for the Family's agreeing to maintain Chateau Cleary as housing for very-low, low-, and moderate-income tenants "for the remaining useful life" of the property, which HUD deemed *was at least 50 years*. 12 U.S.C. §§ 4112(a)(2)(A) & (c)(3); App. 17a-18a, 186a, 190a. However, all agree that these "incentives," if available,[5] would not come close to compensating the Norman Family for lost income resulting from the Family's being forced to forgo market rents and instead house HUD tenants at HUD rents for at least 50 years.

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[4] The process for seeking the sale and incentive "options" was plagued by inefficiency and stymied by inadequate funding from Congress. Throughout the early- to mid-1990s, HUD operated under a hiring freeze that had begun as far back as 1981. JA 980. As a result of the freeze, the New Orleans HUD office found it progressively more difficult to process Plans of Action as they were submitted. By 1994, on a nationwide basis, HUD would have needed 425 staff *years* to process the then-current pipeline of Notices of Intent for receiving incentives or selling to a HUD-approved purchaser. JA 813.

[5] Congress ultimately decided to stop funding these incentives. The testimony showed that position in a funding queue determined whether there would be funding for any Plan of Action finally approved by HUD. JA 978, 981. None of the properties in New Orleans that had approved Plans of Action for incentives received funding; thus, none of the plans was implemented. JA 981.

In short, the "sale" and "use agreement" options were hardly "options" at all, and they certainly were not credible alternatives for the Norman Family. The Norman Family did not want to sell Chateau Cleary, let alone sell in a HUD-arranged process to a HUD-approved purchaser. App. 43a-44a. And the Family certainly did not want to sign up for an *additional* 50 years of HUD oversight and regulation with no prospect of ever achieving a reasonable return on investment. App. 43a.

The HOPE Act And Restoration Of The Right To Prepay

LIHPRHA permanently confiscated the Norman Family's right to prepay its mortgage, and the permanence of LIHPRHA's prepayment ban made Congressional action in March 1996 all the more unexpected. Congress then reversed course and restored owners' prepayment rights as part of the Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (1996) ("HOPE").

However, the Norman Family still could not prepay the mortgage for nearly a year after HOPE as HUD initially stymied the attempts of owners, including the Norman Family, to prepay. App. 23a-24a. Thereafter, when the Norman Family set about to prepay, HUD actions and inaction further and unnecessarily delayed the prepayment process. App. 30a. The Norman Family finally was able to prepay in September 1998 and leave the HUD program. App. 31a.

The Norman Family Waits While The Federal Circuit Addresses LIHPRHA

The Norman Family filed this lawsuit in the Court of Federal Claims ("COFC") in May 1997. The Complaint alleged that the United States, in enacting ELIPHA and LIHPRHA, breached its contractual obligations and took the Norman Family's property without providing just compensation, in violation of the Takings Clause of the Fifth Amendment of the Constitution. App. 31a.

Then nothing happened in this lawsuit for years. The COFC sensibly stayed the litigation in order to permit the Federal Circuit to determine the applicable legal rules in other LIHPRHA takings cases that many other property owners had filed. App. 31a. That proved to be a mistake: The law remains as confused today as it was eleven years ago, even though the Federal Circuit has now issued at least eleven published "LIHPRHA" decisions, including six decisions regarding the "Cienega Gardens" plaintiffs alone.[6]

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[6] *See Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007) ("*Cienega X*"); *City Line Joint Venture v. United States*, 503 F.3d 1319 (Fed. Cir. 2007); *Independence Park Apartments v. United States*, 449 F.3d 1235, *on reh'g*, 465 F.3d 1308 (Fed. Cir. 2006); *Anaheim Gardens v. United States*, 444 F.3d 1309 (Fed. Cir. 2006); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003) ("*Cienega VIII*"); *Chancellor Manor v. United States*, 331 F.3d 891 (Fed. Cir. 2003); *Cienega Gardens v. United States*, 265 F.3d 1237 (Fed. Cir. 2001) ("*Cienega VI*"); *Greenbrier v. United States*, 193 F.3d 1348 (Fed. Cir. 1999); *Cienega Gardens v. United States*, 194 F.3d 1231 (Fed. Cir. 1998) ("*Cienega IV*"); *Alder Terrace, Inc. v. United States*, 161 F.3d 1372 (Fed. Cir. 1998). The

The Federal Circuit's rulings include the following:

1. *Cienega Gardens v. United States*, 194 F.3d 1231 (Fed. Cir. 1998) ("*Cienega IV*"), *cert. denied*, 528 U.S. 820 (1999). In the *Cienega IV* decision, a divided panel vacated summary judgment for the owners on their breach of contract claims, holding that the notes guaranteeing the prepayment right – although endorsed by HUD – constituted a contract only between the property owners and the lender; thus, HUD never was contractually obligated to honor the owners' prepayment rights. Judge Archer dissented, noting that the majority should have construed the contemporaneous and interlocking transaction documents as an integrated whole, rather than in isolation, and therefore should have found a contract between HUD and the owners and a breach of that contract.

2. *Cienega Gardens v. United States*, 265 F.3d 1237 (Fed. Cir. 2001) ("*Cienega VI*"). The Cienega Gardens plaintiffs subsequently litigated takings claims against the government and, in the *Cienega VI* decision, the Federal Circuit rejected the owners' *per se*, physical takings claims, providing just one paragraph of analysis. The court reasoned that just compensation was not required under a *per se* analysis because "the effect of the prepayment restrictions . . . [wa]s merely to enhance an existing tenant's possessory interest." *Id.* at 1248. In so ruling, the court ignored the fact that LIHPRHA

[Footnote continued from previous page]

Independence Park Apartments decisions also involve the *Cienega Gardens* plaintiffs.

compelled owners to submit to the physical occupation of their property by low-income tenants for 20 additional years.

3. *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003) ("*Cienega VIII*"). In *Cienega VIII*, the Federal Circuit for the first time addressed the owners' regulatory takings claims. The court held that four model plaintiffs had, in fact, suffered a regulatory taking, thus requiring the government to pay just compensation. In so holding, the court analyzed the claims in light of the three factors set forth in *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978), i.e., the character of the governmental action, the claimant's investment-backed expectations, and the economic impact on the claimant as a result of the regulation. *Inter alia*, the court determined:

- LIHPRHA had the character of a taking. According to the court:

> The character of the government's action is that of a taking of a property interest, albeit temporarily, and not an example of government regulation under common law nuisance or other similar doctrines. . . . Unquestionably, Congress acted for a public purpose (to benefit a certain group of people in need of low-cost housing), but just as clearly, the expense was placed disproportionately on a few private property owners.

Cienega VIII, 331 F.3d at 1338.

- LIHPRHA interfered with the owners' reasonable, investment-backed expectations. The court noted that "no pre-existing legislation

suggested that prepayment was limited in any way or even that Congress would consider the termination of individual developers' participation in the [HUD] programs a problem," *id.* at 1352, and found that the "prepayment rights provided, from all objective analyses, the crucial economic incentive here," *id.*

▪ LIHPRHA resulted in the model plaintiffs' suffering a severe economic impact. In so ruling, the court focused on the model plaintiffs' minimal return on equity. The court specifically noted its "own determination[ ]" that the return-on-equity measure was "an appropriate foundation for the analysis of 'economic impact,'" *id.* at 1341, and stated that the "loss of return on equity offers us a way to understand that . . . the abrogation of the Model Plaintiffs' prepayment rights had sufficient economic impact to merit compensation," *id.* at 1343.

4. *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007) ("*Cienega X*") (App. 95a-149a).[7] In *Cienega X* – an appeal taken by the government after lengthy trials in which the COFC had applied the law as set forth in *Cienega VIII* and entered judgment for the owners – a specially-convened seven-judge panel of the Federal Circuit vacated judgment for the owners and remanded for a new trial. The *Cienega X* panel ordered the COFC to reassess the application of the *Penn Central* factors

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[7] The *Cienega* and *Chancellor Manor* plaintiffs separately petitioned this Court for a Writ of Certiorari following the Federal Circuit's decision in *Cienega X*. *See* Nos. 07-1100, 07-1101. The petitions were dismissed after plaintiffs reached a settlement with the government.

– not because the COFC had misapplied *Cienega VIII* – but in light of wholly new and contradictory standards decreed by the *Cienega X* panel.

Thus, the court ruled that the COFC erred in applying the return-on-equity approach to measuring economic impact, *even though the Federal Circuit had embraced this very approach in Cienega VIII.*[8] According to the panel, the return-on-equity analysis failed to consider the *lifetime value* of the real properties. App. 116a-122a. Similarly, the *Cienega X* panel held that the trial court erred in not determining whether the prepayment right was the "primary" or "but for" investment expectation. App. 134a-137a. The panel so ruled *even though the Cienega VIII panel previously had held that the owners' investment-backed expectations were presumptively reasonable* because the "prepayment rights provided, from all objective analyses, the crucial economic incentive," and there was no reason for any investor to think that the government would renege on its promise to permit prepayment. 331 F.3d at 1352.

The *Cienega X* panel found other "errors" as well, the practical effect of which was to close the door on all regulatory takings cases under LIHPRHA and to provide a blueprint for the Federal Government on how to avoid paying just compensation for any confiscatory regulation or legislation. By way of

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[8] Similarly, in *Chancellor Manor*, another case concerning whether enactment of LIHPRHA effected a regulatory taking, the Federal Circuit *directed* the trial court on remand to determine economic impact by applying a return-on-equity analysis. 331 F.3d at 905.

example, the *Cienega X* panel faulted the COFC for not considering "the offsetting benefits that the statutory scheme afforded," i.e., the "sale" and "use agreement" options, App. 122a-131a, even though the COFC had held that consideration of these "options" would permit the government to avoid paying *just compensation* by paying *partial compensation* as part of its regulatory program. *See Cienega Gardens v. United States*, 67 Fed. Cl. 434, 470 (2005).

Judge Newman dissented on the ground that the opinion in *Cienega VIII* was controlling on the court. App. 142a-149a.

Procedural History

Both the Norman Family and the United States believed that the Federal Circuit finally had determined the applicable legal framework after *Cienega VIII*: that is, in the view of the Federal Circuit, property owners such as the Norman Family did not have a valid contract claim or *per se* takings claim against the government but likely did have a regulatory takings claim requiring the government to pay just compensation. The COFC therefore lifted the stay in November 2003, soon after *Cienega VIII* had been decided. The case proceeded to discovery and thereafter to a site visit and seven-day trial before Judge Charles Lettow in September 2006 on whether the Norman Family had suffered a regulatory taking as a result of passage of LIHPRHA.[9]

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[9] The Norman Family's breach-of-contract claim against the government was not tried because Federal Circuit precedent expressly precluded it. *See Cienega IV*, 194 F.3d 1231. The

In a careful and detailed opinion, Judge Lettow applied the facts to Supreme Court and prior Federal Circuit precedent, including principally the Federal Circuit's decision in *Cienega VIII*, and ruled that the Norman Family had, in fact, suffered a compensable taking. App. 4a-94a. For example, Judge Lettow determined that LIHPRHA had resulted in the Norman Family's suffering a serious financial loss of 81.25% by applying the return-on-equity methodology endorsed in *Cienega VIII*. App. 73a. The court held that the taking lasted for a period of nearly six years, from May 17, 1991, until February 28, 1997, and awarded just compensation in the amount of $841,839, plus interest. App. 77a, 94a.

The United States appealed. Soon after the government had filed its opening appellate brief, the Federal Circuit decided *Cienega X* by the specially convened seven-judge page panel. In its brief, the Norman Family specifically addressed and challenged the analysis and holdings of *Cienega X* and argued, among other things, that *Cienega X* is fundamentally inconsistent with *Cienega VIII*, other Federal Circuit precedent, and Supreme Court precedent.

The Federal Circuit summarily rejected these arguments, vacated judgment, and remanded for

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[Footnote continued from previous page]

record fully supports this claim (in the absence of Federal Circuit precedent); no further factual findings are necessary. Judge Lettow expressly determined the validity of the various contemporaneous and interlocking documents in which HUD guaranteed the prepayment right. App. 59a.

further proceedings. App. 1a-3a. The court provided no analysis in an unpublished opinion and simply held: "On the merits of the takings analysis, *Cienega X* requires that we vacate the judgment here and remand for further consideration in accordance with *Cienega X*." *Id.* at 3a.[10]

REASONS FOR GRANTING THE WRIT

The Federal Circuit's decision here, in which the court simply adopted its prior decision in *Cienega X*, requires immediate review for at least three separate reasons. *First*, the Federal Circuit fundamentally misconstrued this Court's precedents in not finding that LIHPRHA effected a physical, *per se* taking.[11] In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court explained that, whenever the government requires an owner to acquiesce in the physical occupation of his property, the Takings Clause of the Fifth Amendment requires just compensation. Here, LIHPRHA required the Norman Family to submit to the physical occupation of Chateau Cleary by low-income, HUD-approved tenants. The government must pay just compensation for this physical invasion.

Second, and with regard to the Federal Circuit's "regulatory takings" jurisprudence, the Federal

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[10] The court also rejected the government's argument that the Norman Family's takings claim was not ripe for adjudication. App. 3a.

[11] The "physical takings" issue is properly before this Court even though the COFC did not expressly address it. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

Circuit applied the three "*Penn Central*" factors in a manner contrary to numerous decisions of this Court. For example, the Federal Circuit held that, in all regulatory takings cases and regardless of the character of the governmental action, an owner must prove a "severe" economic impact. But this Court's precedent makes clear that the regulatory takings inquiry is flexible and designed to promote justice and that a regulation having a minimal economic impact on the claimant (or indeed no economic impact at all) may still effect a taking where the character of the governmental action is extraordinary. *See, e.g., Hodel v. Irving*, 481 U.S. 704 (1987).

The governmental action here was truly extraordinary. LIHPRHA commanded the Norman Family to house low-income tenants for a period of 20 additional years, thereby depriving the Norman Family of the fundamental and ancient right to exclude others. In an indistinguishable case, applying a *Penn Central* analysis, this Court held that the right to exclude "falls within [the] category of interests that *the Government cannot take without compensation.*" *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (emphasis added). This Court's review is required to correct the obvious conflict between the Federal Circuit's and this Court's precedents.

Finally, this Court's review is needed to correct two rulings of the Federal Circuit which, if left standing, would in many cases, indeed in most cases, eliminate the government's obligation to pay just compensation for regulatory takings. First, the Federal Circuit ruled that the "offsetting benefits" available to any claimant must be considered in

evaluating whether there has been a taking at all, and not simply whether the government has paid just compensation. However, as Justice Scalia pointed out in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), the Federal Circuit's ruling, if allowed to stand, would unconstitutionally license the government to pay only *partial* compensation rather than *just* compensation. 520 U.S. at 745 (Scalia, J., concurring) (joined by O'Connor, J., and Thomas, J.).

The Federal Circuit also ruled that, in all regulatory takings cases, the economic impact of any regulation must be measured in reference to the *lifetime value* of the subject property. Whether the Federal Circuit intended to or not, this holding will absolve the Federal Government from having to pay just compensation in virtually all temporary regulatory takings cases because of the infinite life of real property and because of the indefinite expected duration of an ongoing business concern. The Federal Circuit's sweeping holding finds no support in this Court's precedents and, indeed, is flatly contrary to any number of cases holding that the government must pay just compensation for temporary takings. *See, e.g., First English Evangelical Lutheran Church of Glendale v. City of Los Angeles*, 482 U.S. 304 (1987); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949).

Because of the unique position of the Federal Circuit in adjudicating takings claims for compensation against the Federal Government, there is no possibility of a Circuit "split" or further elucidation of the issues raised herein. And because the Federal Circuit decided these issues in a specially convened seven-judge panel, there is no

possibility of the Federal Circuit revisiting these issues *en banc*. This Court alone has the ability to review and correct the Federal Circuit's enunciation of sweeping rules that flatly contradict this Court's precedents.

I. THE FEDERAL CIRCUIT DECISIONS ADDRESSING LIHPRHA CONFLICT WITH THIS COURT'S PRECEDENTS

A. The Federal Circuit's Holding That LIHPRHA Does Not Have the Character Of A Forced Physical Occupation Conflicts With *Loretto*

This Court in *Loretto* stated that any government-authorized physical invasion of property is "determinative" in a takings analysis and requires the government to pay just compensation for the invasion. 458 U.S. at 426. The Court therefore held that a New York statute compelling a landlord to permit the installation of cable television facilities on an apartment building worked a taking. *Id.* at 441. The law cannot be that a landlord compelled to accommodate one 30-foot cable and two small cable boxes has a compensable takings claim but a landlord compelled *to house* hundreds of low-income tenants for 20 years does not.

Yet this is precisely what the Federal Circuit has held. In four sentences, without any citation to *Loretto*, the court ruled that "the effect" of LIHPRHA was "merely to enhance an existing tenant's possessory interest." *See Cienega VI*, 265 F.3d at 1248 (citation and quotation marks omitted). But LIHPRHA did not "merely" enhance an existing tenant's possessory interest: It *required* owners, including the Norman Family, to lodge HUD-

approved tenants for 20 years. The owners lost completely the right to evict tenants, tear down their complexes, and make some other use of their land. They lost the right to convey the property (absent HUD approval). And they lost the right to rent units at market rents. When one HUD-approved tenant left, the owners had no choice but to rent to some other HUD-approved tenant at a HUD-approved rate.

The Federal Circuit's LIHPRHA precedent simply cannot be squared with *Loretto*.

Other Supreme Court precedents prove the point. Indeed, this petition presents exactly the "different" or "future" case referenced in both *Yee v. City of Escondido*, 503 U.S. 519 (1992), and *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987). In *Yee*, the Court held that a rent control ordinance directed at mobile home parks did not amount to a physical or *per se* taking. In so holding, the Court stressed that the mobile park owners *voluntarily* rented their land and "neither the city nor the State compels [the owners], once they have rented their property to tenants, to continue doing so." *Yee*, 503 U.S. at 527-28. In *Florida Power*, the Court similarly rejected the physical takings claims of utility companies that claimed that the government had physically taken their property by regulating the rates that they could charge for carrying cable lines on their poles. *Fla. Power*, 480 U.S. at 253. The Court emphasized that the utility companies could not complain of a *physical occupation* when they themselves authorized the carrying of the cable lines. "[I]t is the invitation, not the rent, that makes the difference." *Id.* at 252.

But both *Yee* and *Florida Power* indicated that the result would be different if the government had *required* the owners to submit to the physical occupation. The *Yee* Court thus observed that "[a] different case would be presented [if] the statute . . . compel[led] a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." 503 U.S. at 528. The *Florida Power* Court noted that its ruling likely would be different "if the FCC in a future case *required* utilities, over objection to enter into . . . pole attachment agreements." 480 U.S. at 252 n.6 (emphasis added).

Here, LIHPRHA compelled the Norman Family, against its will, to house low-income tenants. The Norman Family agreed to lodge low-income tenants for 20 years, consistent with the terms of the regulatory agreement, but the Family never consented to a 40-year physical occupation. On the contrary, the Norman Family had an unfettered right to prepay its mortgage on the twentieth anniversary and exit the HUD program until Congress confiscated that right.

B. The Federal Circuit's Rigid Application Of The *Penn Central* Factors Conflicts With This Court's Precedents

In *Cienega VIII*, the Federal Circuit recognized that owners may have a valid regulatory takings claim against the government in light of LIHPRHA. However, in *Cienega X*, the specially-convened seven-judge panel reversed course and rigidly applied the "economic impact" and "investment-backed expectations" factors of the *Penn Central* test to preclude any determination of a taking. App.

116a-141a. The Federal Circuit's analysis cannot be squared with this Court's precedents.

The *Penn Central* test seeks "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (O'Connor, J., concurring). The three *Penn Central* factors are but guideposts in making this inquiry. *See id.* *Penn Central* itself notes that whether a regulation effects a taking is inherently an "ad hoc" inquiry concerned with achieving "justice and fairness." 438 U.S. at 104.

The Federal Circuit in *Cienega X* paid lip service to this flexible inquiry, *see* App. 114a, and then proceeded to ignore it. The court's decision can only be read as mandating that each *Penn Central* factor be independently satisfied. Thus, for example, the court explained that regardless of the character of the government's action, "a regulatory taking does not occur unless there are serious financial consequences" that rise to the level of "severe economic deprivation." App. 121a. In light of decisions explaining that a diminution in value of at least 75% is required to have a "severe economic deprivation," *see Cienega Gardens*, 67 Fed. Cl. at 470, and the Federal Circuit's conclusion that economic impact must be measured by looking at the *lifetime value* of the property, *see infra* at 31-36, the court effectively slammed the door on any regulatory takings claim here.

This was error and contrary to this Court's precedents. For example, in *Hodel* the Court found a compensable taking notwithstanding a miniscule economic loss and the likely absence of any

investment-backed expectations because the Court considered the right at issue, devise, to be fundamental. 481 U.S. at 716. The Court noted that "the right to pass on property – to one's family in particular – has been part of the Anglo-American legal system since feudal times." *Id.*

A right at issue in these LIHPRHA cases – the right to exclude others – similarly has long been part of the Anglo-American legal system. This Court has referred to the right to exclude as "perhaps the most fundamental of all property interests." *Lingle*, 544 U.S. at 539. And in *Kaiser Aetna*, a regulatory takings case, the Court *held* that the right to exclude "falls within [the] category of interests that *the Government cannot take without compensation.*" 444 U.S. at 180 (emphasis added).

The Federal Circuit's decisions here and in *Cienega X* fail even to cite, let alone discuss, either *Hodel* or *Kaiser Aetna*. The Federal Circuit's failure to cite these cases is puzzling not only because the Norman Family argued these cases but also because the Federal Circuit had previously *acknowledged* that LIHPRHA confiscated owners' fundamental right to exclude. *See Cienega VIII*, 331 F.3d at 1328 (LIHPRHA "intentionally defeated the Owners' real property rights to sole and exclusive possession after twenty years and to convey or encumber their properties after twenty years"); *id.* at 1338 (analogizing the government to a holdover tenant and stating that "[w]e agree that the enactment of ELIHPA and LIHPRHA could fairly be characterized as akin to this type of physical invasion").

The extraordinary governmental action here was the functional equivalent of a physical invasion and akin to the classic governmental taking. The

Federal Circuit's decision in *Cienega X*, if allowed to stand, would gut myriad cases of this Court emphasizing the flexible, ad hoc nature of the *Penn Central* analysis, as well as the rulings in *Hodel* and *Kaiser Aetna*, thereby preventing the application of this Court's precedents in the Federal Circuit.

II. THE FEDERAL CIRCUIT HAS DECIDED ISSUES RESERVED BY THIS COURT IN WAYS THAT WILL ELIMINATE MOST, IF NOT ALL, TEMPORARY REGULATORY TAKINGS CLAIMS AGAINST THE FEDERAL GOVERNMENT

The Federal Circuit in *Cienega X* also decided two important constitutional issues previously reserved by decisions of this Court. *First*, the Federal Circuit held that mitigating benefits under a challenged regulation must count as an offset when computing a regulation's economic impact on the claimant. App. 122a-131a. *Second*, the Federal Circuit held that a claimant challenging a temporary regulation, even one lasting many years and concerning an income-producing property, must prove a substantial diminution in the *lifetime value* of his or her property. App. 116a-122a. These twin holdings, if left to stand, will eviscerate the requirement that the government pay just compensation for regulatory takings and therefore require this Court's immediate review.

A. The Federal Circuit's Holding That "Offsetting Benefits" Must Be Considered In Determining The Economic Impact Of Any Regulation Effectively Licenses The Government To Escape Paying Just Compensation In Every Case

The COFC emphatically dismissed the government's argument that the "offsetting benefits" of LIHPRHA must be considered in determining, in the first instance, whether LIHPRHA effected a taking of the Norman Family's property. According to the court: "The value of the options available under the preservation statutes might affect the just compensation due a plaintiff who has suffered a regulatory taking, to the extent the owner realized value from one or more options, but the existence of the options does not affect the takings analysis itself." App. at 55a, n.27. The Federal Circuit itself had indicated likewise, both in the context of LIHPRHA and in other contexts. *See Independence Park Apartments*, 449 F.3d at 1247 ("This situation is analogous to a physical taking in which the government appropriates a plaintiff's property at the outset and then takes steps to mitigate the financial impact of the taking, rather than returning the property to the plaintiff.") (discussing LIHPRHA's offsetting benefits), *on reh'g*, 465 F.3d 1308; *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1176 (Fed. Cir. 1991) ("[A] compensated taking is still a taking. An offer to pay would make no sense if nothing were taken.").

The seven-judge panel in *Cienega X* disregarded these precedents, however, in holding that the availability of LIHPRHA's "sale" and "use agreement" options must be considered in the

takings analysis. App. 122a-131a. Thus, according to the logic of the *Cienega X* panel, there would not be a taking if the Norman Family could have sold Chateau Cleary at 30% of its market value or, through a use agreement, recoup 30% of any lost income. This 30% recompense would be sufficient to defeat any claim because of the Federal Circuit's rigid requirement that the claimant suffer a "severe economic impact." *Cf. Cienega Gardens*, 67 Fed. Cl. at 470 (Federal Circuit precedents require a 75% loss in property value to satisfy economic impact prong of *Penn Central* test).

The Federal Circuit based this ruling on two authorities: legislative history, including President George H.W. Bush's signing statement indicating that the offsetting benefits "are more generous than are necessary," and this Court's decision in *Penn Central*. App. 123a-124a; 131a. However, President Bush's belief about the "generosity" of these benefits has no bearing on the takings analysis, and *Penn Central* is a slim reed upon which to base this extraordinary holding.

The *Penn Central* opinion does note that the value of transferable development rights ("TDRs") "undoubtedly mitigate[s] whatever financial burdens the law has imposed on appellants and, for that reason, [is] to be taken into account in considering the impact of the regulation." 438 U.S. at 137. However, this Court in *Suitum* did not view this passing remark as binding. 520 U.S. 725 (1997). Instead, the Court expressly reserved the question "whether or not these TDR's may be considered in deciding the issue whether there has been a taking in this case, as opposed to the issue whether just

compensation has been afforded for such a taking." *Id.* at 728.

Justice Scalia's concurrence in *Suitum*, joined by Justices O'Connor and Thomas, confirms that the Federal Circuit misapplied *Penn Central* in holding that offsetting benefits "must" be considered in the takings calculus. Justice Scalia analogized TDRs to "a cash payment from the government," *id.* at 747, and explained that any contrary ruling would permit the government to escape its constitutional obligation to provide just compensation:

> If money that the government-regulator gives to the landowner can be counted on the question of whether there *is* a taking (causing the courts to say that the land retains substantial value, and has thus not been taken), rather than on the question of whether the compensation for the taking is adequate, the government can get away with paying much less. That is all that is going on here.

Id. at 748 (emphasis in original).

Justice Scalia proceeded to distinguish *Penn Central* on the ground that the claimants there could use their TDRs on properties adjacent to Grand Central Terminal and therefore all these properties, not just the Terminal, formed the relevant parcel of land. *Id.* at 749. According to Justice Scalia, *Penn Central* "would deserve to be overruled" if it could not be distinguished because "it is contrary to the whole principle that land-use regulation, if severe enough, can constitute a taking which must be *fully* compensated." *Id.* (emphasis in original).

In short, the Federal Circuit was simply incorrect in stating that *Penn Central* compelled the consideration of the availability of LIHPRHA "options" as offsetting benefits. The Court should review this important issue; otherwise, as Justice Scalia correctly pointed out, much of this Court's regulatory takings jurisprudence will be rendered a "nullity." *Id.* at 750.[12]

B. The Federal Circuit's Requirement That The Lifetime Value Of Property Must Be Considered In Measuring Economic Impact Will Preclude Virtually All Temporary Regulatory Takings Claims Against The Federal Government

The seven-judge *Cienega X* panel further ruled that, in measuring the economic impact of any temporary regulation, a claimant must prove a substantial diminution in the *lifetime* value of the property, for example by looking at the change in market value of the property at the time of the taking or by looking at the loss of income "over the entire useful life of the property." App. 122a. The court therefore faulted the trial judge for measuring economic impact by analyzing the claimants' loss of return during the period of the taking, App. 116a-122a, *even though the trial judge performed the*

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[12] In all events, this Court should review the Federal Circuit's assertion that a government-regulated "sale option" can negate a finding of a regulatory taking. There can be no doubt that a *forced* conveyance would require just compensation; the result should not be different where the government styles the sale of the subject property as an "option."

exact same analysis approved in Cienega VIII and other Federal Circuit decisions.[13]

The Federal Circuit said its ruling was compelled by the "parcel-as-a-whole" rule as set forth in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). According to the Federal Circuit, "[i]n *Tahoe-Sierra*, the necessity of considering the overall value of the property was explicitly confirmed in the temporary regulatory takings context." App. 119a. This is not so.

Tahoe-Sierra has relevance only to the extent that it confirms that the Federal Circuit fundamentally erred in its analysis and holding. In *Tahoe-Sierra*, the Court cited the so-called parcel-as-a-whole rule in holding that a 32-month temporary moratorium on construction did not constitute a compensable taking. But critically important, and overlooked by the Federal Circuit, the plaintiffs in *Tahoe-Sierra* did not proceed under a *Penn Central* theory; instead, the plaintiffs alleged a "categorical" taking depriving them of all economic value under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). *See Tahoe-Sierra*, 535 U.S. at 317-18, 320. In order to present a categorical takings claim under *Lucas*, a plaintiff must establish that the

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[13] *See Cienega VIII*, 331 F.3d at 1343 ("loss of return on equity offers us a way to understand" economic impact); *Chancellor Manor*, 331 F.3d at 905 (instructing trial court on remand to "calculate the rate of return on invested capital under [LIHPRHA] as implemented by HUD and the reasonableness of that return"); *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1188 (Fed. Cir. 2004) (explaining that a returns-based analysis for measuring economic impact is particularly appropriate for an ongoing business concern).

regulation deprives the owner of "'*all* economically beneficial uses' of his land." *Id.* at 330 (quoting *Lucas*, 505 U.S. at 1019) (emphasis in original). *Tahoe-Sierra* merely stands for the proposition that a 32-month *temporary* moratorium on construction does not *wholly* deprive the owner of all economic value, thereby resulting in a per se, categorical taking. 535 U.S. at 332.

To the extent *Tahoe-Sierra* addresses *Penn Central* at all, its discussion wholly undermines the reasoning and holding of *Cienega X*. Most significant, the *Tahoe-Sierra* Court observed that certain of the plaintiffs "might have *prevailed* under a *Penn Central* analysis." *Id.* at 334 (emphasis added).[14] But, obviously, these plaintiffs, had they made a *Penn Central* claim, would stand no chance of recovery under *Cienega X*'s rigid application of the property-as-a-whole rule, as any 32-month moratorium would not have had a dramatic impact on the *lifetime* value of the property.

The Federal Circuit's approach to measuring economic impact is inconsistent not only with *Tahoe-Sierra* but also with numerous other decisions. In *Federal Power Commission v. Hope Natural Gas*, 320 U.S. 591 (1944), the Court held that regulations resulting in a confiscatory rate of return required the payment of just compensation; the Court never considered diminution in the lifetime value of the utility. *See also Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989). And, in *Penn Central* itself, the

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[14] The Court pointedly noted that from a takings perspective "any moratorium that lasts for more than one year [may] be viewed with special skepticism." *Tahoe-Sierra*, 535 U.S. 341.

Court declined to find a regulatory taking, *inter alia*, because the plaintiff continued "to obtain a 'reasonable return' on its investment" notwithstanding the offending regulation. 438 U.S. at 136.

This Court's focus on a rate-of-return analysis stands to reason: In measuring the economic impact of a regulation on *an income-producing property*, a court should look to the *loss of income* during the period of the challenged regulation.[15] The Federal Circuit's "lifetime value" rule, in contrast, does not pass the common-sense test. As Judge Lettow correctly observed in this case, adopting the government's position, which the Federal Circuit has now proceeded to do, "could allow the government to take an owner's $10 million annual income stream from a $100 million property for four and a half years – yielding the government $45 million – and then assert that the owner had not suffered a severe economic impact because he or she had only been deprived of 45% of the value of his property." App. 71a.

Judge Lettow's hypothetical is, if anything, too generous. The Federal Circuit incredibly ruled that

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[15] This Court on several occasions has required the government to pay just compensation "for the value of the use of the land during [the] period [of the regulation]." *First English*, 482 U.S. 304; *see also United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *Kimball Laundry*, 338 U.S. 1; *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945). If the Constitution requires the payment of just compensation for "use" of the property during the period of the taking, then what the government "took" should also be measured by the owner's loss during the period of the taking.

the unknown and unknowable fact at the time of enactment of LIHPRHA, i.e., that Congress would later reverse course and restore the right to prepay, must be considered in determining the economic impact of LIHPRHA on the date the taking began. App. 132a-133a. In other words, an ostensibly permanent regulation must be evaluated in reference to the government's subsequent repeal of the regulation.[16] But, of course, a three-, four-, five-, or six-year regulatory taking may not diminish the *lifetime value* of an income-producing property at all. Thus, the $100 million income-producing property referenced in Judge Lettow's hypothetical may immediately revert to having a value of $100 million after the regulation ends, meaning that, under the logic of the Federal Circuit, the government could escape its obligation to pay just compensation in nearly every case simply by rescinding the offending regulation.

In short, the Federal Circuit's decision, if allowed to stand, would deny just compensation for virtually

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[16] Again, the Federal Circuit neglected to apply this Court's precedent. In *First English*, this Court held that the invalidation of an ordinance "though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." 482 U.S. at 319. *First English* can only be read as requiring courts to determine whether a regulation *as enacted* would constitute a taking and rejecting the notion that the government can avoid paying just compensation by rescinding the offending regulation. *See also, e.g., Lucas*, 505 U.S. at 1032-33 ("The potential for future relief does not control our disposition, because whatever may occur in the future cannot undo what has occurred in the past. . . . If this deprivation amounts to a taking, its limited duration will not bar constitutional relief.") (Kennedy, J. concurring).

all temporary regulatory takings. And, because the government has the power to make any "permanent" taking a "temporary" taking, the Federal Circuit's decision has relevance far beyond the context of "temporary" regulatory takings.

III. THE ISSUES RAISED IN THIS PETITION REQUIRE THE COURT'S IMMEDIATE ATTENTION

The Court should not wait for the important constitutional issues raised in this petition – issues decided by the Federal Circuit either in conflict with this Court's precedents or reserved by this Court's precedents – to further "percolate" in the lower courts because there will be no percolation. The Federal Circuit has exclusive jurisdiction of claims for just compensation against the Federal Government, and the Federal Circuit, a court of twelve judges, will not be revisiting the decision by the seven-judge panel in *Cienega X en banc* or otherwise. This case illustrates the point. Two of the judges on this panel did not participate in *Cienega X*. Yet the panel considered *Cienega X* to be controlling. The panel simply dismissed the Norman Family's serious arguments out-of-hand, without so much as a sentence of analysis. App. 3a.

The Federal Circuit has grappled with LIHPRHA for more than a decade, and the Court's latest published decision in *Cienega X* has done nothing but misapply this Court's precedents and further confuse the law. As Judge Lettow recently bemoaned: "[W]hen you get to *Cienega X* and you still don't know what you're supposed to do as a Trial Judge, that's a problem, and somebody needs to sort it out. It's beyond this Court's pay grade to do that."

Transcript of Scheduling Conference at 19-20, *Independence Park v. United States*, No. 94-10001C (Fed. Cl. Oct. 25, 2007). Only this Court can "sort it out."

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2007-5094

CCA ASSOCIATES,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

Appeal from the United States Court of Federal Claims in case no. 97-CV-334, Judge Charles F. Lettow.

DECIDED: JULY 21, 2008

Before DYK, PROST, and MOORE, Circuit Judges.

PER CURIAM.

This is another case involving a regulatory takings claim arising out of the enactment of the Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, tit. II, 101 Stat. 1877 (1988) ("ELIHPA") and the Low-Income Housing Preservation and Resident Homeownership Act of 1990, Pub. L. No. 101-625, tit. VI, 104 Stat. 4249 (1990) (codified at 12 U.S.C. §§ 4101-4124)

("LIHPRHA") (collectively "the Preservation Statutes"). Defendant-Appellant Unites States ("the government") appeals from a final judgment of the Court of Federal Claims, finding that Plaintiff-Appellee CCA Associates ("CCA") suffered a temporary taking and awarding CCA just compensation. *CCA Assocs. v. United States*, 75 Fed. Cl. 170, 206 (2007). We affirm-in-part, vacate-in-part, and remand.

We most recently addressed these issues in *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007) ("*Cienega X*"). That decision, which issued after the decision of the Court of Federal Claims in this case and the submission of the government's opening brief, addressed arguments that are in many respects identical to those presented here.

As a panel of this court, we are obligated to follow our earlier decision in *Cienega X*. However, notwithstanding *Cienega X*, the government argues that CCA's takings claims are not ripe because CCA did not apply for permission to prepay the loan, or, alternatively, that it did not apply for either of the two other benefits available under the Preservation Statutes—the use agreement option and the sale option.

We find that there is no distinction between the government's contention here that CCA's claim is not ripe, and the contention made in *Cienega X*, which we rejected. Just as applying for permission to prepay was shown in *Cienega X* to be futile and therefore not necessary for ripeness, so too here the Court of Federal Claims did not err in finding that an application to prepay would be futile and that the takings claim was ripe. In *Cienega X*, we also

rejected the argument that an owner must pursue other statutory options in order to achieve ripeness, holding that "the ripeness doctrine does not require the owners to apply for voluntary incentives such as the sale option that they did not wish to pursue." *Id.* at 1275 n.9. We therefore affirm the Court of Federal Claims' determination that CCA's takings claim is ripe.

CCA urges that we not follow *Cienega X*, and that the Court of Federal Claims' conclusion that a taking occurred should be affirmed. We disagree. On the merits of the takings analysis, *Cienega X* requires that we vacate the judgment here and remand for further consideration in accordance with *Cienega X*. Here, as in *Cienega X*, the Court of Federal Claims "should allow both sides to supplement the record with additional relevant evidence if they wish to do so." *Id.* at 1291.

AFFIRMED-IN-PART, VACATED-IN-PART, AND REMANDED

No costs.

UNITED STATES COURT OF FEDERAL CLAIMS

CCA ASSOCIATES, Plaintiff,

v.

UNITED STATES, Defendant.

No. 97-334C.

Jan. 31, 2007.

LETTOW, Judge.

This case raises issues that reprise those addressed, tried, and decided in *Cienega Gardens v. United States,* 67 Fed.Cl. 434 (2005) ("*Cienega IX*"), on remand from *Cienega Gardens v. United States,* 331 F.3d 1319 (Fed. Cir. 2003) ("*Cienega VIII*"), and *Chancellor Manor v. United States,* 331 F.3d 891 (Fed. Cir. 2003). Plaintiff, CCA Associates ("CCA"), is a Louisiana partnership that owns an apartment complex in Metairie, Louisiana. CCA claims that the United States effected a temporary taking of its property without just compensation in contravention of the Fifth Amendment of the United States Constitution. Specifically, CCA avers that the Emergency Low Income Housing Preservation Act of 1987, Pub.L. No. 100-242, 101 Stat. 1877 (1988) ("ELIHPA" or "Title II") (codified at 12 U.S.C. § 1715*l* note) and the Low-Income Housing Preservation and Resident Homeownership Act of 1990, Pub.L. No. 101-625, 104 Stat. 4249 ("LIHPRHA" or "Title VI") (codified in scattered sections of Title 12 of the U.S. Code, including 12 U.S.C. §§ 4101 to 4124), stripped the partnership of

its contractual right to prepay its mortgage and thereby to exit the low-income housing program under which it was operating and begin to operate the apartment complex on a conventional basis.

A seven-day trial was held on September 5-8, 12, and 26-27, 2006, and a site visit was conducted on September 11, 2006. Following post-trial briefing, closing argument, and supplemental briefing, this case is now ready for disposition. For the reasons set forth, the court finds that the government's actions constituted a temporary taking of CCA's property for which CCA is entitled to just compensation.

FACTS[1]

A. *Statutory and Regulatory Framework*

1. *Evolution of the Section 221(d)(3) program.*

During the Great Depression, Congress sought to encourage private lending for home repairs and home construction by passing the National Housing Act, Pub.L. No. 73-479, 48 Stat. 1246 (1934). The Act created the Federal Housing Administration and authorized its administrator to insure home mortgages under two programs: one for residences designed for up to four families and another for multifamily housing units. *Id.* §§ 201, 203, 207, 48

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[1] This recitation of facts constitutes the court's primary findings of fact in accord with Rule 52(a) of the Rules of the Court of Federal Claims ("RCFC"). Other findings of fact and rulings on questions of mixed fact and law are set out in the analysis.

In this opinion, references to plaintiff's exhibits are to "PX __" and to defendant's exhibits are to "DX __" References to plaintiff's demonstrative exhibits are to "PDX __" and to defendant's demonstrative exhibits are to "DDX __."

Stat. at 1247-48, 1252. A more direct effort to aid low-income families followed three years later with the passage of the United States Housing Act of 1937, Pub.L. No. 75-412, 50 Stat. 888, which created a federally-funded public housing program. *Id.* §§ 9-11, 50 Stat. at 891-93; *see* HUD Historical Background, http:// www. hud. gov/ offices/ adm/ about/ admguide/ history. cfm (last visited Jan. 26, 2007).

Beginning with the Housing Act of 1949, Pub.L. No. 81-171, 63 Stat. 413, Congress also attempted to support low-income housing through various slum-clearance and urban-redevelopment projects. *Id.* §§ 101-10, 63 Stat. at 414-421. To aid families displaced by these urban redevelopment projects, Congress amended the National Housing Act in 1954 to add Section 221(d)(3), which authorized mortgage insurance for non-profit organizations and public housing authorities assisting such families. *See* Housing Act of 1954, Pub.L. No. 83-560, § 123, 68 Stat. 590, 599-601 (codified as amended at 12 U.S.C. § 1715*l*(d)(3)).

The Housing Act of 1961, Pub.L. No. 87-70, 75 Stat. 149, expanded the Section 221(d)(3) program by broadening the purpose of the program to include "moderate income families," not just families displaced by urban redevelopment projects, and by opening the program to private-sector investors. *Id.* §§ 101(a)(2), (a)(6), 75 Stat. at 149-50 (codified as amended at 12 U.S.C. § 1715*l*(a), (d)(3)); *see* S.Rep. No. 87-281, at 5, 96 (1961), *reprinted in* 1961 U.S.C.C.A.N. 1923, 1926, 2014. The Housing Act of 1961 restricted mortgage insurance under Section 221(d)(3) to projects containing five or more units, § 101(a)(12), 75 Stat. at 152 (codified, as amended, at

12 U.S.C. § 1715*l*(f)), but also provided two key incentives for investors: authorization for waivers of FHA mortgage insurance premiums and loans at below-market interest rates. *See id.* §§ 101(a)(6), (11), (c), 75 Stat. at 150, 152, 153 (codified, as amended, at 12 U.S.C. § 1715*l*(d)(5), (f)); *see* S.Rep. No. 87-281, at 97, *reprinted in* 1961 U.S.C.C.A.N. at 2016.[2] In 1968, Congress added a "Section 236"

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[2] The Housing Act of 1961 did not authorize the FHA itself to make loans with below-market interest rates, but it effectively guaranteed those rates by granting the Federal National Mortgage Association ("Fannie Mae") the power to purchase mortgages insured under the Section 221(d)(3) program. § 101(c), 75 Stat. at 153. As the House report accompanying the 1961 Act explained: "The essence of the new proposal is to provide long-term loans at a very low interest rate, using the FHA insurance machinery and providing the necessary funds through the resources of the special assistance programs of [Fannie Mae]." H.R.Rep. No. 87-447, at 11 (1961); *see also* S.Rep. No. 87-281, at 8, *reprinted in* 1961 U.S.C.C.A.N. at 1930 ("The [Section 221(d)(3)] mortgage loans could be purchased from the lender under the special assistance program of [Fannie Mae]."). In practice, only Fannie Mae purchased these loans, so the Section 221(d)(3) program "amount[ed] to a[ ] [Fannie Mae] loan to FHA-approved cooperative projects." Note, *The Cooperative Apartment in Government-Assisted Low-Middle Income Housing*, 111 U.Pa. L. Rev. 638, 650 (1963); *see also* Nathaniel S. Keith, *An Assessment of National Housing Needs*, 32 Law & Contemp. Probs. 209, 214 (1967) (Under the Section 221(d)(3) program, "the permanent mortgage is purchased by [Fannie Mae]."). *See, e.g.*, PX 33 (Transfer and Contribution to Partnership from Ernest B. Norman, Jr. to CCA (Dec. 31, 1985)) ("Ernest B. Norman, Jr. transfer to CCA") at 3 (indicating that CCA's original mortgagee, Pringle-Associates Mortgage Corporation, had sold the mortgage to the Government National Mortgage Association ("Ginnie Mae"), a successor to the original Fannie Mae); *see also* 12 U.S.C. § 1717(a), (b)(1) (providing that the original Fannie Mae was split into Fannie Mae and Ginnie

program, which subsidized owners' monthly mortgage payments and provided mortgage insurance. Housing and Urban Development Act of 1968, Pub.L. No. 90-448, § 201(a), 82 Stat. 476, 498-501 (codified, as amended, at 12 U.S.C. § 1715z-1(a), (j)).

By statute, the Secretary of HUD has authority to condition participation in the Section 221(d)(3) program on an owner's agreement to restrictions on the use of his property. 12 U.S.C. § 1715*l*(b), (f). Under a regulatory agreement co-signed with HUD, participating owners were required to limit occupancy to low- or moderate-income families, charge rents in accord with a HUD-approved rental schedule, manage their properties "in a manner satisfactory to [HUD]," and refrain from conveying the property without HUD approval. PX 2 (Regulatory Agreement, signed by HUD, Ernest B. Norman, Jr., and J. Robert Norman (November 7, 1969)) ("1969 regulatory agreement"), ¶¶ 4(b), 5(c), 6(c), 9(a). Owners were subject to HUD audits and were required to submit annual financial reports to HUD. *Id.*, ¶¶ 9(c), (e). In addition, an owner's annual return was limited to six percent of the initial equity investment. *Id.* ¶ 6(e)(1).

Owners assented to these restrictions in part because they could borrow 90 percent of the purchase price on the basis of a forty-year amortization period, 12 U.S.C. § 1715*l*(d)(3)(iii), (*i*)(2)(A)(iv); Tr. 1161:3-6 (Test. of Kenneth Malek, a

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Mac, both of which have statutory authority to purchase mortgages insured under Section 221(d)(3)).

tax accounting expert called by the government),[3] and they also were given a Builder's and Sponsor's Profit and Risk Allowance ("Builder's Allowance") that, when coupled with the loan, typically reduced an investor's initial cash outlay to 1.5 to 3 percent of the cost of the project. Tr. 1160:12-19 (Test. of Malek).[4] Owners additionally were permitted to take out non-recourse loans, thereby avoiding personal liability for the debt. *See, e.g.,* PX 3 (secured note co-signed by Ernest B. Norman, Jr. and J. Robert Norman (November 7, 1969)) ("1969 note"); Tr. 94:23 to 95:1 (Test. of Mr. Ernest B. Norman, III, the managing partner of CCA). Lastly, although the Section 221(d)(3) program generally precluded prepayment of the forty-year mortgages without prior HUD approval, owners of so-called limited-dividend corporations were entitled to prepay their mortgages after twenty years. 24 C.F.R. §

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[3] The Housing Act of 1961 initially permitted owners of newly constructed projects to obtain no-equity loans under the Section 221(d)(3) program. §§ 101(a)(6), (c), 75 Stat. at 150-51, 153; *see also* H.R.Rep. No. 87-447, at 11 (stating that the Housing Act of 1961 broadened the Section 221(d)(3) program "to authorize a new program of long-term, low-interest-rate, 100-percent loans for rental and cooperative housing projects containing five or more dwelling units"). The Housing Act of 1964, Pub.L. No. 88-560, 78 Stat. 769, later limited the loan amount to ninety percent of the replacement cost of the property for governmental, non-profit, and other qualified owners. *See* § 114(c), 78 Stat. at 779 (codified as amended at 12 U.S.C. § 1715*l*(d)(3)(iii)).

[4] The Builder's Allowance was equal to ten percent of the total estimated cost of the project, exclusive of the value of the land. Tr. 1166:7-11 (Test. of Malek).

221.524(a)(1)(ii) (1971); *see also* PX 3 (1969 note) (referring to prepayment by a "limited dividend corporation"); PX 5 (secured note co-signed by Ernest B. Norman, Jr. and J. Robert Norman (May 17, 1971)) ("1971 note") (same).[5] This prepayment right was dictated by regulation, 24 C.F.R. § 221.524(a)(1)(ii) (1971), was explicitly stated in the mortgage note, PX 3 (1969 note); PX 5 (1971 note), and was incorporated by reference in the mortgages. PX 4 (mortgage signed by Ernest B. Norman, Jr., J. Robert Norman, and Pringle-Associated Mortgage Corporation (November 7, 1969)) ("1969 mortgage"); PX 6 (mortgage signed by Ernest B. Norman, Jr., J. Robert Norman, and Pringle-Associated Mortgage Corporation (May 17, 1971)) ("1971 mortgage").[6] Prepayment removed the regulatory restrictions and allowed participation in the conventional rental housing market.

2. *Emergency Low Income Housing Preservation Act*

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[5] HUD defined a "limited dividend mortgagor" as "a corporation, trust, partnership, association, other entity, or an individual ... restricted by law (or by the [FHA] Commissioner) as to distribution of income and shall be regulated as to rents, charges, rate of return, and methods of operation in such form and manner as is satisfactory to the Commissioner." 24 C.F.R. § 221.510(c) (1971).

[6] The pertinent regulation read: "A mortgage indebtedness may be prepaid in full and the [FHA] Commissioner's controls terminated without the prior consent of the Commissioner ... [w]here the mortgagor is a limited distribution type ... and where the prepayment occurs after the expiration of 20 years from the date of final endorsement of the mortgage." 24 C.F.R. § 221.524(a)(1)(ii) (1971).

of 1987.

By the mid-1980s, Congress realized that if owners of housing insured under Section 221(d)(3) began to exercise their prepayment rights, the stock of low-income housing units would decline in volume. H.R.Rep. No. 100-122(I), at 35, *reprinted in* 1987 U.S.C.C.A.N. 3317, 3351 (1987). Reciting that "in the next 15 years, more than 330,000 low income housing units insured or assisted under sections 221(d)(3) and 236 could be lost as a result of the termination of low income affordability restrictions," Congress enacted ELIHPA, § 202(a)(1), 101 Stat. at 1877 (codified at 12 U.S.C. § 1715*l* note). ELIHPA forestalled prepayment of Section 221(d)(3) mortgages by conditioning prepayment on HUD's prior approval, abrogating the unrestricted prepayment right specified in HUD's regulations and the owners' mortgage notes. ELIHPA § 221(a), 101 Stat. at 1878-79; 24 C.F.R. § 221.524(a)(1)(ii) (1971); PX 3 (1969 note); PX 5 (1971 note). In September 1990, HUD issued regulations implementing ELIHPA. *See* Prepayment of a HUD-Insure Mortgage by an Owner of Low-Income Housing, 55 Fed.Reg. 38,944 (Sept. 21, 1990) (codified at 24 C.F.R. §§ 248.101-248.261 (1991)).

Under ELIHPA, an owner seeking to prepay or to alter the terms of the mortgage or the regulatory agreement had first to file with HUD a notice of intent outlining his or her plans. ELIHPA § 222, 101 Stat. at 1879. After HUD received the owner's notice of intent, the department would provide the owner with information needed to file a so-called plan of action and a list of ELIHPA-established incentives available upon an agreement to extend the use of the owner's housing units for low-income tenants.

ELIHPA § 223(a), 101 Stat. at 1879. Those incentives included HUD's agreement to increase the allowable annual distribution, alter the method of calculating an owner's equity in the property, increase the owner's access to accounts it maintained for residual receipts and replacements,[7] provide insurance for a second mortgage, or facilitate the sale of the property to a non-profit organization, a public agency, or a tenant cooperative. ELIHPA § 224(b)(1)-(4), (7), 101 Stat. at 1880. The plan of action that the owner submitted to HUD was to include any proposed changes to the regulatory agreement, the mortgage, or the low-income affordability restrictions, as well as an assessment of the effect of proposed changes on existing tenants and the local supply of low- and very-low-income housing. ELIHPA § 223(b)(1),(3),(5)-(6), 101 Stat. at 1879.

Within 60 days of an owner's submission of a plan of action, HUD was to advise the owner of any "deficiencies" that prevented the plan of action from being approved and to suggest revisions to the plan that would lead to its approval by HUD. ELIHPA § 227(a), 101 Stat. at 1883. No later than 180 days after receipt of an owner's plan of action, HUD was required to notify the owner in writing whether HUD had approved the plan and, if HUD had

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[7] Section 221(d)(3) regulatory agreements required owners to maintain a "reserve fund for replacements" to cover repair expenses and a "residual receipts fund," which consisted of cash remaining after a limited dividend entity had declared and paid its distributions. *See* PX 2 (1969 regulatory agreement).

rejected the plan, what steps the owner could take to obtain approval. ELIHPA § 227(b)(1), 101 Stat. at 1883. Before HUD could permit owners to prepay, the Secretary had to make written findings that:

> (1) implementation of the plan of action will not materially increase economic hardship for current tenants or involuntarily displace current tenants (except for good cause) where comparable and affordable housing is not readily available; and
>
> (2)(A) the supply of vacant, comparable housing is sufficient to ensure that such prepayment will not materially affect-
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> (i) the availability of decent, safe, and sanitary housing affordable to lower income and very low-income families or persons in the area that the housing could reasonably be expected to serve;
>
> (ii) the ability of lower income and very low-income families or persons to find affordable, decent, safe, and sanitary housing near employment opportunities; or
>
> (iii) the housing opportunities of minorities in the community within which the housing is located; or
>
> (B) the plan has been approved by the appropriate State agency and any appropriate local government agency for the jurisdiction within which the housing is located as being in accordance with a State strategy approved by the Secretary under section 226.

ELIHPA § 225(a), 101 Stat. at 1880.[8]

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[8] In November 1988, Congress amended ELIHPA to clarify

If the submitted plan of action requested incentives in exchange for extending the low-income affordability restrictions, ELIHPA conditioned approval of the plan upon a Secretarial finding that: (1) the housing would remain affordable to very-low-, low-, and moderate-income tenants for the remaining term of the mortgage, (2) the owner would expend adequate funds for maintenance and operation of the property, (3) the current tenants would not be involuntarily displaced, except for good cause, (4) any rent increase would not exceed thirty percent of a tenant's adjusted gross income or the fair market rent for comparable Section 8(b) housing,[9] whichever was lower, (5) rent increases, except those based on increased operating expenses, would be phased in, and (6) any rent increases, to the extent practicable, would not decrease the proportion of low-income tenants for whom such

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that the phrase "materially increase economic hardship" included "a monthly rental payment by a current tenant that exceeds 30 percent of the monthly adjusted income of the tenant or an increase in the monthly rental payment in any year that exceeds 10 percent (whichever is lower), or ... in the case of a current tenant who already pays more than such percentage, an increase in the monthly rental payment in any year that exceeds the increase in the Consumer Price Index or 10 percent (whichever is lower)." Stewart B. McKinney Homeless Assistance Amendments Act of 1988, Pub.L. No. 100-628, § 1024(1), 102 Stat. 3224, 3270-71.

[9] Section 8(b) of the United States Housing Act of 1937 provides rent subsidies via direct payments through public housing authorities to owners of low-income housing. *See* United States Housing Act of 1937, § 8 (codified, as amended, at 42 U.S.C. § 1437f(b)).

housing units were available and affordable. ELIHPA § 225(b)(3), 101 Stat. at 1881. The approved plans locking in the affordability restrictions for the life of the mortgages were known as "use agreements." Tr. 627:23 to 628:18 (Test. of Jim E. Alexander, a former HUD employee); *Cienega Gardens IX,* 67 Fed. Cl. at 441-42.

In sum, after the enactment of ELIHPA, the owner of a property insured under Section 221(d)(3) had four options. First, he or she could do nothing and let the forty-year mortgage run its course with the regulatory restrictions remaining in place. Second, he or she could attempt to gain HUD approval for prepayment, a process that required the Secretary's certification that prepayment would not have adverse effects on the low-income housing stock or on current tenants. ELIHPA § 225(a), 101 Stat. at 1880. Third, an owner could agree to extend the affordability restrictions in exchange for HUD-provided incentives, such as increasing annual distributions. ELIHPA § 224(b)(1), 101 Stat. at 1880-81. Fourth, the owner could ask HUD to arrange for a sale to HUD-approved buyers. ELIHPA §§ 224(b)(7); 225(b)(3), 101 Stat. at 1880-81.[10]

3. *Low-Income Housing Preservation and Resident Homeownership Act of 1990.*

With the passage of LIHPRHA, § 601(a), 104

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10 The precise process for arranging for a HUD-assisted sale of the property was not specified either in ELIHPA or in HUD's implementing regulations. *See* ELIHPA, §§ 223(b)(4), 224(b)(7); 24 C.F.R. § 248.231 (1991) (noting only that HUD would facilitate such a sale, by providing an "expedited review of a request for approval of a transfer of physical assets").

Stat. at 4249-50 (1990) (codified at 12 U.S.C. § 4101, *et seq.*), Congress extended indefinitely ELIHPA's temporary requirement that barred owners of housing insured under Section 221(d)(3) from prepaying their mortgages and removing the attendant regulatory restrictions without HUD approval. LIHPRHA § 601(a), 104 Stat. at 4249; *Cienega Gardens VIII,* 331 F.3d at 1326. HUD promulgated regulations implementing LIHPRHA in April 1992. *See* Prepayment of Low Income Housing Mortgages, 57 Fed. Reg. 12,041 (Apr. 8, 1992) (codified at 24 C.F.R. §§ 248.1-248.319 (1993)).

LIHPRHA's restrictions on prepayment were similar, but not identical, to those in ELIHPA. As with ELIHPA, the owner had four options, three of which required HUD approval: do nothing, prepay the mortgage, seek incentives to extend the affordability restrictions, or sell the property to a HUD-approved buyer. 12 U.S.C. § 4101(a). The process for obtaining HUD's approval also began in the same way, *i.e.,* with the filing of a notice of intent.[11] Thereafter, HUD would provide the owner with information on the criteria for termination and the available incentives, and the owner would then submit a plan of action. 12 U.S.C. §§ 4101-02, 4106.

The LIHPRHA criteria for approval of prepayment were more stringent than those in ELIHPA. Prior to amendment of ELIHPA in the

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[11] Under LIHPRHA, owners seeking to sell their properties actually were required to submit two notices of intent-one to initiate the process and a second, 30 days after receiving from HUD information necessary to prepare a plan of action for the sale. 12 U.S.C. §§ 4102(a), 4106(b), (d).

Stewart B. McKinney Homeless Amendments Act of 1988, *see supra,* at 175, n. 8, ELIHPA had left the phrase "materially increase economic hardship" undefined, but LIHPRHA defined that phrase to include (1) monthly rental increases exceeding ten percent or exceeding thirty percent of a tenant's monthly adjusted income, whichever was lower, or (2) if a tenant already was paying more than such percentages, monthly rental increases exceeding ten percent or exceeding the increase in the Consumer Price Index. 12 U.S.C. § 4108(a)(1)(A). If prepayment would result in increases beyond these thresholds, the Secretary was not permitted to approve prepayment. 12 U.S.C. § 4108(a).

The procedures under LIHPRHA for receiving incentives or arranging for a sale were also more onerous than they were under ELIHPA. HUD was only permitted to approve plans of action seeking incentives or a sale upon the Secretary's finding that the housing would be retained for very-low, low-, and moderate-income tenants "for the remaining useful life" of the property in question. 12 U.S.C. § 4112(a)(2)(A). Owners were required to petition HUD for a determination of when the useful life of the property had expired, but the owner could not submit such a petition until 50 years after the approval of a plan of action for the property. 12 U.S.C. § 4112(c)(3). LIHPRHA also removed from ELIHPA's list of possible incentives an increase in the owner's annual distributions. *Compare* § 224(b), 101 Stat. at 1880, *with* 12 U.S.C. § 4109(b).

Under LIHPRHA, owners seeking to obtain incentives in exchange for extending affordability restrictions or to sell their property to a HUD-approved purchaser had to overcome more hurdles

than those required under ELIHPA. For an owner who had filed a notice of intent, LIHPRHA mandated a process for appraising the so-called "preservation value" of the property – *i.e.*, the fair market value of the property "based on [its] highest and best use," taking into account the costs of converting the property to market-rate rental housing. 12 U.S.C. § 4103.[12] An owner was not permitted to sell his or her property for more than the preservation value. 12 U.S.C. § 4110(b)(1).

For properties appraised under LIHPRHA, HUD also required calculation of the so-called "aggregate preservation rents" by a formula that estimated the "gross potential income for the project;" such an estimate entailed covering various costs, such as debt service and operating expenses, and, in the case of owners seeking incentives to extend the affordability restrictions, taking into account an annual authorized return. 12 U.S.C. § 4104(b). HUD then would determine if the aggregate-preservation rents for a property exceeded an aggregate statutory cap, which was determined by "multiplying 120 percent of the fair market rental (established [in accord with statutory procedures]) for the market area in which the housing is located by the number of dwelling units in the project." 12 U.S.C. § 4105(a).

If the aggregate-preservation rents exceeded the cap, the owner could: (1) request incentives, provided "the amount of the incentives [would] not exceed an

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[12] The owner and HUD each chose appraisers to assess the "preservation value" of the property. If neither the two appraisers, nor the owner and HUD, could agree on a value, the owner and HUD would jointly choose a third appraiser, whose appraisal would be binding. 12 U.S.C. § 4110(b)(1).

amount that [could] be supported by a projected income stream equal to the [cap]," 24 C.F.R. § 248.127(a) (1993); 12 U.S.C. § 4105(b)(2)(A), (2) sell the property at a price that did not exceed the cap, 12 U.S.C. § 4105(b)(2)(B), or (3) file a second notice of intent indicating his or her desire to prepay the mortgage or voluntarily terminate the FHA insurance, on the condition that if a HUD-approved purchaser offered within fifteen months to pay the appraised "preservation value," the owner was required to make the sale. 12 U.S.C. §§ 4105(b)(2)(C), 4111(b),(c). If the preservation rents did not exceed the cap, the owner could file a plan of action to request incentives or seek a HUD-approved sale. 12 U.S.C. § 4105(b)(1).[13]

As noted, a HUD-approved sale required the owner to file a second notice of intent with HUD. 12 U.S.C. § 4106(d). For a year following HUD's receipt of this second notice of intent, an owner could sell only to so-called priority purchasers, which were limited to HUD-approved resident homeownership groups and non-profits agreeing to maintain the affordability restrictions "for the remaining useful life of the project." 12 U.S.C. §§ 4110(b)(1), 4116; 24 C.F.R. § 248.101 (1993). For the succeeding three months, owners could sell only to so-called qualified purchasers, which included for-profit purchasers, but only those pledging to retain the affordability restrictions for the life of the property. 12 U.S.C. § 4110(c); 24 C.F.R. § 248.101 (1993). LIHPRHA authorized HUD to provide, in addition to incentives,

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[13] HUD was required to consider the rent caps in determining whether to provide incentives to owners seeking them. 12 U.S.C. § 4109(a).

direct financial assistance to facilitate a sale, under statutory conditions restricting the sales price and the potential buyers. *See* 12 U.S.C. § 4110(d).

In the event HUD did approve an owner's plan of action to obtain incentives or to sell his or her property, LIHPRHA permitted prepayment in particular cases in which the plan was not fulfilled. If HUD failed to satisfy any of three separate timelines for providing incentives it already had approved, the owner could prepay the mortgage. 12 U.S.C. § 4114(a)(3). Similarly, if HUD had approved the sale of the property, but the owner could not find a *bona fide* purchaser, the owner also could prepay. 12 U.S.C. § 4114(a)(2).

LIHPRHA also permitted owners whose properties would become "eligible low-income housing" before January 1, 1991, and who had filed a notice of intent by that date, to elect to follow the regulatory scheme under either ELIHPA or LIHPRHA. *See* LIHPRHA § 604(a), 104 Stat. at 4277 (codified at 12 U.S.C. § 4101 note). For purposes of this election, "eligible low-income housing" included properties whose mortgages or loans were insured under Section 221(d)(3) with a below-market interest rate and were eligible for prepayment within 24 months of LIHPRHA's enactment. 12 U.S.C. § 4119(1)(A)(ii), (1)(B).

4. *H.R. 2099.*

Five years after the enactment of LIHPRHA, Congress sought to change its approach to prepayment. On December 14, 1995, Congress passed H.R. 2099, which provided appropriations for various federal agencies, including HUD. The bill conditioned HUD's funding for assistance under

ELIHPA and LIHPRHA on numerous requirements including that "an owner of eligible low-income housing [be able to] prepay the mortgage or request voluntary terminat[i]on of a mortgage insurance contract, so long as said owner agrees not to raise rents for sixty days after such prepayment." H.R. 2099, 104th Cong. (1st Sess. 1995) (undesignated second paragraph of Title II); 141 Cong. Rec. S18,657-58 (1995) (Senate passage of H.R. 2099). President Clinton vetoed H.R. 2099, *see* 141 Cong. Rec. H15,061 (1995), and the bill did not become law.

5. *The Housing Opportunity Program Extension Act of 1996.*

Within months of President Clinton's veto of H.R. 2099, however, Congress passed and President Clinton signed into law the Housing Opportunity Program Extension Act of 1996 ("HOPE"), Pub.L. No. 104-120, 110 Stat. 834. HOPE reinstated the prepayment rights of owners whose mortgages were insured under Section 221(d)(3). *Id.* § 2(b), 110 Stat. at 834-35 (March 28, 1996). HOPE did so expressly by incorporating the various conditions on HUD funding set out in H.R. 2099, including the condition making appropriations related to ELIHPA and LIHPRHA contingent on HUD's permitting owners of eligible low-income housing to prepay their mortgages, provided the owners did not raise their rents for sixty days following prepayment. *Id.* HOPE thus lifted the prepayment restrictions imposed by ELIHPA and LIHPRHA. *See Cienega VIII,* 331 F.3d at 1326-27. HOPE provided that, except as otherwise stated in future appropriation acts, the conditions of H.R. 2099 would apply to ELIHPA and LIHPRHA funds "provided in any appropriation Act enacted after the date of the enactment of this Act." HOPE, §

2(b)(2), 110 Stat. at 834-35.[14] Subsequent appropriation acts reiterated HOPE's reinstatement of owners' prepayment rights. *See* Omnibus

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[14] In pertinent part, HOPE provided:

(b) Low-Income Housing Preservation.-

(1) Use of Amounts-Notwithstanding any provision of the Balanced Budget Downpayment Act, I (Public Law 104-99; 110 Stat. 26) or any other law, the Secretary shall use the amounts described in paragraph (2) of this subsection under the authority and conditions provided in the second undesignated paragraph of the item relating to "Housing Programs-Annual Contributions for Assisted Housing" in title II of the bill, H.R. 2099 (104th Congress), as passed [by] the House of Representatives on December 7, 1995; except that for purposes of this subsection, any reference in such undesignated paragraph to March 1, 1996, shall be construed to refer to April 15, 1996, any reference in such paragraph to July 1, 1996, shall be construed to refer to August 15, 1996, and any reference in such paragraph to August 1, 1996, shall be construed to refer to September 15, 1996.

(2) Description of Amounts.-Except as otherwise provided in any future appropriation Act, the amounts described under this paragraph are any amounts that-

(A) are-

(i) unreserved, unobligated amounts provided in an appropriation Act enacted before the date of the enactment of this Act;

(ii) provided under the Balanced Budget Downpayment Act, I; or

(iii) provided in any appropriation Act enacted after the date of the enactment of this Act; and

(B) are provided for use in conjunction with properties that are eligible for assistance under the Low-Income Housing Preservation and Resident Homeownership Act of 1990 or the Emergency Low Income Housing Preservation Act of 1987.

Consolidated Rescissions and Appropriations Act of 1996, Pub.L. No. 104-134, 110 Stat. 1321, 1321-267 (codified at 12 U.S.C. § 4101 note); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1977, Pub.L. No. 104-204, 110 Stat. 2874, 2883-84 (codified at 12 U.S.C. § 4101 note); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, Pub.L. No. 105-276, § 219, 112 Stat. 2461, 2487-88 (1998).

6. *Preservation letters.*

Notwithstanding the enactment of HOPE, reinstating owners' rights to prepay their mortgages after 20 years *without* HUD approval, HUD sent to its regional offices a series of so-called preservation letters, asserting that certain restrictions on prepayment still were in effect. Less than a month after HOPE became law, a second preservation letter expressly asserted that prepayment required HUD approval. PX 63 (Mem. from Chris Greer, Acting Deputy Assistant Secretary for Multifamily Housing Programs, to Directors of Housing, et al. (April 12, 1996)) ("Preservation Letter No. 2") at 5; Tr. 216:18 to 218:9 (Test. of Norman). A subsequent preservation letter stated that owners need not obtain HUD approval for prepayment, but it set out other requirements, including: (1) that the owner notify HUD of its intention to prepay, (2) that the owner pay fifty percent of the relocation expenses of any tenant, (3) that the lender submit a form to HUD requesting prepayment of the mortgage, and (4) that owners of low-income housing located in low-vacancy areas–three percent or lower vacancies–not raise rents for three years except as necessitated by

increased operating costs. PX 65 (Mem. from Nicholas P. Retsinas, Assistant Secretary for Housing, to Directors of Housing, et. al. (May 3, 1996)) ("Preservation Letter No. 4"), Preservation Questions and Answers, at 2-6; Tr. 219:22 to 222:19 (Test. of Norman). In the sixth preservation letter, HUD scaled back the requirement to pay tenant's relocation expenses to cover only moves "in the area where the project ... is located," but reiterated the three-year restriction on rent increases for housing in low-vacancy areas. PX 67 (Mem. from Retsinas to Directors of Housing, et al. (July 1, 1996)) ("Preservation Letter No. 6"), Preservation Questions and Answers at 3, 6-7; Tr. 223:19 to 224:20 (Test. of Norman). With the constantly changing requirements of the preservation letters layered over the statutory mandate of HOPE, the prepayment process remained in a state of flux until HUD released Preservation Letter 97-1 on December 16, 1997, which Preservation Letter stated that, following the HOPE-mandated sixty-day moratorium on rent increases, there was "no limit to how high the owner [could] raise the rent." Tr. 234:4 to 235:3 (Test. of Norman); PX 75 (Mem. from Retsinas to Directors of Housing, et al. (Dec. 16, 1996)) ("Preservation Letter No. 97-1"), Attach. at 7.

B. *CCA's Property*

Chateau Cleary Apartments ("Chateau Cleary") is a 104-unit apartment complex in West Metairie, Louisiana, just outside the city of New Orleans. PX 106 (Expert Report of Dr. Wade R. Ragas, an economist and real estate expert called to testify by CCA) (May 30, 2005) ("second Ragas report") at 17; DX 140 (Management Plan of Chateau Cleary Apartments by Mr. Jim Alexander (May 31, 1997))

("Alexander report") at 13-15. The complex consists of one-, two-, and three-bedroom apartments and is located in a residential neighborhood that boasts a low crime rate, good schools, major shopping centers, and hospitals and other medical facilities, plus access to major roads such as Interstate 10. Tr. 52:14-23 (Test. of Norman); 562:13 to 563:7 (Test. of Alexander), 1122:20 to 1123:11 (Test. of Ann Kizzier, a supervisory official in HUD's New Orleans office); DX 140 (Alexander report) at 22-24; PX 106 (second Ragas report) at 14, 17. The site visit and testimony at trial revealed that Chateau Cleary was sturdily built such that it suffered relatively minor damage from Hurricane Katrina, Tr. 52:5-13 (Test. of Norman); the site visit also revealed that the complex is well maintained and in good condition.

On October 6, 1969, Ernest B. Norman, Jr. and J. Robert Norman ("Norman brothers") purchased from New Orleans investors the land on which to build Chateau Cleary, as well as the plans that the selling investors had developed for the complex. Tr. 53:24 to 54:8, 55:12-15 (Test. of Norman); PX 1 (Cash Sale of Property, signed by the Norman brothers and Patrick J. Tomeny, Anthony D. Lewis, and Paul Atwood (October 6, 1969)). In conjunction with the sale, on November 7, 1969, the Norman brothers signed three interrelated documents: a secured note, a mortgage, and a regulatory agreement. The secured note was set out on HUD Form 1734 and was in the amount of $1,601,100.00. PX 3 (1969 note). The secured note was endorsed by HUD, explicitly referred to the mortgagor's right to prepay the mortgage after 20 years, and incorporated by reference a mortgage signed the same day by the Norman brothers and Pringle-Associated Mortgage

Corporation. PX 3 (1969 note); PX 4 (1969 mortgage).[15] The mortgage was written on FHA Form 4123-D and incorporated by reference the terms of the secured note and the regulatory agreement. PX 4 (1969 mortgage), first undesignated paragraph, ¶ 3. The Norman brothers and HUD also signed on FHA Form 1730 an agreement entitled "Regulatory Agreement for Limited Distribution Mortgagor Projects Under Section 221(d)(3) of the National Housing Act, As Amended." PX 2 (1969 regulatory agreement), undesignated second paragraph. Under the regulatory agreement, in exchange for HUD's action to provide mortgage insurance, endorse the secured note, and agree to the transfer of the mortgaged property, the Norman brothers agreed to charge HUD-approved rents to HUD-approved tenants. *See id.* ¶¶ 4(b), 5(c), undesignated second paragraph. The regulatory agreement also incorporated by reference the mandates of Section 221(d)(3) and the implementing regulations, which included the right to prepay the mortgage after 20 years. *See id.*, undesignated second paragraph; 24 C.F.R. § 221.524(a)(1)(ii)

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[15] The provision in the note guaranteeing the Norman brothers' right to prepay read:

> The debt evidenced by this note may not be prepaid either in whole or in part, prior to the final maturity date hereof without the prior written approval of the Federal Housing Commissioner except a maker which is a limited dividend corporation may prepay without such approval after 20 years from the date of final endorsement of this note by the Federal Housing Commissioner.

PX 3 (1969 note).

(1969).

Due to an increase in labor costs in the New Orleans area from late 1969 to mid-1971, the Norman brothers requested and HUD approved an increased mortgage amount. As a result, on May 17, 1971, the Norman brothers signed on HUD forms a second secured note for $1,699,500.00 and a second mortgage. PX 5 (1971 note); PX 6 (1971 mortgage). The new note explicitly referred to the prepayment right and incorporated by reference Section 221(d)(3) and HUD's implementing regulations. PX 5 (1971 note); 24 C.F.R. § 221.524(a)(1)(ii) (1971). The new mortgage incorporated by reference the 1971 note and the original 1969 regulatory agreement. PX 6 (1971 mortgage), undesignated first paragraph, ¶ 3. HUD calculated the Norman brothers' initial equity investment as $215,867, entitling them to a maximum annual dividend of $12,952, in accord with the six percent cap on dividends contained in the regulatory agreement. *See* PX 106 (second Ragas report) at 54 (showing the "earned" but unpaid amount increasing by $12,952, less any dividend paid, each year); PX 2 (1969 regulatory agreement), ¶ 6(e)(1); *see also* Tr. 76:21 to 77:2 (Test. of Norman).[16]

On March 27, 1985, Ernest B. Norman, Jr. formed the CCA Associates partnership, with the partners consisting of him, his children, and a trust for his grandchildren. PX 30 (CCA Articles of

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[16] CCA's financial statements record the HUD-determined equity as $215,863, rather than $215,867 as used by Dr. Ragas, plaintiff's expert, in his second expert report. The minuscule difference is without consequence. Both the financial statements and Dr. Ragas's report cite an annual dividend cap of $12,952.

Partnership). On April 2, 1985, with HUD's approval, J. Robert Norman sold his fifty percent interest in Chateau Cleary to CCA for $677,550. PX 28A (Act of Sale conveying J. Robert Norman's interest in Chateau Cleary to CCA (Apr. 2, 1985)). CCA also assumed the Chateau Cleary mortgage. PX 28 (Assumption Agreement between Ginnie Mae and CCA (April 2, 1985)). As a consequence, HUD also required CCA to sign a new regulatory agreement for Chateau Cleary. PX 29 (Regulatory Agreement, signed by HUD and Ernest B. Norman, III, acting on behalf of CCA (Apr. 26, 1985)) ("1985 regulatory agreement"). The 1985 regulatory agreement mirrored that executed in 1969, *see generally id.;* PX 2 (1969 regulatory agreement), included the HUD restrictions related to tenants and rent, PX 29 (1985 regulatory agreement) ¶ 4, and incorporated by reference the mandates of Section 221(d)(3) and the associated regulations, which continued to include the right to prepay the mortgage after 20 years. *Id.,* undesignated second paragraph; 24 C.F.R. § 221.524(a)(1)(ii) (1985); Tr. 172:2 to 173:10 (Test. of Norman). Eight months later, on December 31, 1985, Ernest B. Norman, Jr. transferred his one-half interest in Chateau Cleary to CCA, giving CCA full ownership of the property. PX 33 (Transfer and Contribution to Partnership from Ernest B. Norman, Jr. to CCA (Dec. 31, 1985)).

Following the passage of LIHPRHA, CCA filed a notice of intent with HUD in December 1990 to preserve its options under ELIHPA and LIHPRHA. PX 42 (CCA Notice of Intent (Dec. 28, 1990)). In June 1992, CCA filed a notice of election to proceed under ELIHPA, while reserving its rights to proceed under LIHPRHA. PX 51 (CCA Notice of Election to

Proceed (June 8, 1992)). Prior to the passage of HOPE, however, CCA never filed a plan of action with HUD seeking incentives or permission to sell the property. Tr. 383:8-16 (Test. of Norman). Following the passage of HOPE and despite the confusion caused by the preservation letters, by October 1996 CCA had begun inquiring into options for refinancing its mortgage loan, anticipating that the time when it might be able to prepay its mortgage was approaching. Tr. 236:7-16 (Test. of Norman). In November 1996, CCA also retained an appraiser who valued Chateau Cleary at $2,300,000, absent the HUD restrictions. PX 74 (Mem. from Ernest Norman[, III] to John Sibal, Vice President, Eustis Mortgage (Nov. 16, 1996)) (forwarding appraisal to potential mortgagee).

In late 1996, with CCA's permission, Mr. Jim Alexander, then a HUD employee, began a study to examine CCA's options after prepayment, including selling Chateau Cleary or refinancing the property with a conventional mortgage. PX 75a (Letter from Norman to Alexander (Dec. 19, 1996)); Tr. 240:6-10 (Test of Norman), 557:22-558:1 (Test of Alexander).[17] Ernest B. Norman, III, managing

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[17] Mr. Alexander's report was not an official HUD report, Tr. 1077:11 to 1078:22 (Test. of Gladys Ann Kizzier, a HUD employee who supervised Mr. Alexander), but it was the culmination of a HUD-funded and HUD-approved course of study under which Mr. Alexander received the designation of "certified property manager" from the Institute of Real Estate Management ("IREM"). *See* Tr. 512:23-25, 514:17-20, 515:20 to 516:2, 520:13 to 521:5 (Test. of Alexander). Mr. Alexander's report listed his HUD work address and was forwarded to Mr. Ernest B. Norman, III, CCA's managing partner, with a cover letter on HUD letterhead. *See* DX 140 (Alexander report) at 1, 3; *but see* Tr. 1078:14 to 1079:1 (Test. of Kizzier) (indicating

partner of CCA, awaited the results of Mr. Alexander's study, which he received in April 1997. Tr. 558:2-5 (Test. of Alexander). Mr. Alexander's study examined four "possible solutions" for CCA: (1) remain a HUD-insured property, (2) prepay the mortgage and sell the property in a year, (3) prepay the mortgage, make minimal upgrades to the property, and sell the property in seven years, and (4) prepay the mortgage, make major upgrades to the property, and sell the property in seven years. DX 140 (Alexander report) at 137.[18]

After reviewing the conclusions of the study and discussing them with Mr. Alexander, Tr. 247:21 to 248:7 (Test. of Norman), Mr. Norman adopted a hybrid of two options Mr. Alexander had proposed and began undertaking some improvements to Chateau Cleary. Tr. 270:13-19, 273:10-13 (Test. of Norman). On April 29, 1998, CCA signed a contract with Hampstead Partners to guide CCA through the prepayment process, delivered the required prepayment notifications to HUD, and after several months of HUD-related administrative delays, prepaid its HUD-insured mortgage on September 30,

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that Mr. Alexander did not have permission, and would not have received permission, from his direct supervisor to use the HUD letterhead).

[18] Although Mr. Norman had explained to Mr. Alexander that CCA planned to prepay its mortgage, PX 75a (Letter from Norman to Alexander (Dec. 19, 1996)), Mr. Alexander included in his report the option to remain in the Section 221(d)(3) program, DX 140 (Alexander report) at 137, apparently because the IREM curriculum required that the study include maintaining the *status quo* among the options being considered. Tr. 559:15-20 (Test. of Alexander).

1998. Tr. 1776:19-24, 1780:4 to 1782:15, 1793:4-12 (Test. of Norman Root);[19] 280:17-22 (Test. of Norman); PX 83 (Prepayment Service Consulting Agreement (Apr. 29, 1998)); PX 86 (letters from Hampstead Partners to HUD, the mortgagee, and a local councilman announcing CCA's intent to prepay its mortgage (May 11, 1998)); Pl.'s Post-Trial Br. ("Pl.'s Br.") at 22.

C. *Procedural History*

CCA filed its complaint on May 13, 1997, alleging that the government had breached its contract with CCA by terminating its unconditional right to prepay its HUD-insured mortgage after 20 years and also seeking just compensation under the Fifth Amendment for the temporary taking of CCA's property. Compl. ¶¶ 3, 39, 42. The case was stayed for a considerable period pending decisions in the *Cienega* case. After the decision in *Cienega VIII* was rendered, the stay was lifted, *see* Order of November 25, 2003, and the case was prepared for trial. Trial was held on September 5-8, 12, and 26-27, 2006, followed by post-trial briefing, closing argument on November 30, 2006, and supplemental briefings by plaintiff on December 6, 2006, and by the government on December 13, 2006. The case is now ready for decision.

ANALYSIS

A. *Ripeness*

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[19] Mr. Norman Root, a real estate consultant with Hampstead Partners, did not testify at trial, but by agreement of the parties, his deposition testimony, taken on May 24, 2000, was read into the trial record. Tr. 1770:18-23.

As a threshold matter, the government challenges the justiciability of CCA's claims on the ground that they are not ripe. *See* Def.'s Post-Trial Mem. of Contentions of Fact and Law ("Def.'s Br.") at 20. The government avers that CCA failed to exhaust a required administrative process because HUD never made a "final decision regarding the application of the regulations to the property at issue." *Id.* at 20-21 (quoting *Palazzolo v. Rhode Island,* 533 U.S. 606, 618, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001)). Specifically, the government focuses on CCA's failure to (1) seek permission from HUD to prepay or (2) submit a plan of action to sell Chateau Cleary or seek incentives to remain in the Section 221(d)(3) program. Def.'s Br. at 20-21. CCA counters that any request to prepay would have been futile because CCA could not have satisfied the statutory criteria for prepayment in the preservation statutes, leaving HUD no discretion to approve prepayment. Pl.'s Br. at 34. CCA also contends that CCA was not required to pursue the statutory options to seek a sale or financial incentives. *Id.*

A regulatory takings claim is not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 186, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985); *Palazzolo,* 533 U.S. at 620, 121 S.Ct. 2448 ("a landowner may not establish a taking before the land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation."); *see also Stearns Co. v. United States,* 396 F.3d 1354, 1358 (Fed. Cir. 2005).

This principle generally requires a regulatory-taking claimant to seek an agency decision on the application of the pertinent statute or regulation to his or her property before asserting that the government has taken the property. *See Palazzolo,* 533 U.S. at 620, 121 S.Ct. 2448; *Williamson,* 473 U.S. at 186, 105 S.Ct. 3108. The Supreme Court has excepted from this general rule the circumstance where the agency "has no discretion to exercise over [the landowner's] right to use her land." *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725, 739, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997). In a similar vein, the Federal Circuit has stated that "[o]nce it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." *Cienega Gardens v. United States,* 265 F.3d 1237, 1246 (Fed. Cir. 2001) ("*Cienega VI*") (quoting *Palazzolo,* 533 U.S. at 620, 121 S.Ct. 2448).

The government argues that ELIHPA and LIHPRHA gave HUD discretion to determine whether prepayment would be allowed and that this discretion renders CCA's futility argument unavailing. *See* Def.'s Br. at 24. HUD concededly had authority to determine whether an owner's prepayment would meet the statutory criteria; the pertinent question becomes whether those statutory criteria effectively barred CCA's prepayment. *See* ELIHPA § 225(a), 101 Stat. at 1880; 12 U.S.C. § 4108(a)(1)(B), (2); Tr. 586:2-5 ("HUD had the discretion under [LIHPRHA] to approve or deny, but there were two primary tests that Congress directed HUD to apply.") (Test. of Alexander); Stewart B. McKinney Homeless Assistance Amendments Act of

1988, Pub.L. No. 100-628, § 1024(1), 102 Stat. 3224, 3270-71 ("McKinney 1988 Act") (amending ELIHPA to specify numerical criteria by which to determine whether prepayment would "materially increase economic hardship" for tenants); 12 U.S.C. § 4108(a)(1)(A)(i) (same). Under ELIHPA, as amended in November 1988, and under LIHPRHA, the phrase "materially increase economic hardship" was defined with specificity as monthly rental increases exceeding ten percent or exceeding thirty percent of a tenant's monthly adjusted income, whichever was lower. McKinney 1988 Act § 1024(1), 102 Stat. at 3270-71; 12 U.S.C. § 4108(a)(1)(A)(i).[20] As the Federal Circuit explained in *Cienega VI*, "[S]ection 4108 sets forth strict numerical criteria that must be met before HUD may exercise any discretion it has to approve prepayment requests." 265 F.3d at 1246. If prepayment would run afoul of these strict numerical restrictions or the other statutory standards, HUD then had *no* discretion to permit prepayment. ELIHPA § 225(a), 101 Stat. at 1880 (Secretary may approve prepayment "*only* upon a written finding" that the statutory criteria would be satisfied) (emphasis added); 12 U.S.C. § 4108(c) (if the statutory criteria are not satisfied "the Secretary shall disapprove the plan"); *see also* Tr. 587:18 to 589:6 (Test. of Alexander) (HUD was required to abide by the statutory criteria).

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[20] If a tenant already was paying more than these percentages, monthly rental increases were limited to ten percent or the increase in the CPI, whichever was lower. McKinney 1988 Act § 1024(1), 102 Stat. at 3270-71; 12 U.S.C. § 4108(a)(1)(A)(ii).

The government's ripeness arguments run headlong into two fundamental facts about HUD-subsidized housing in the New Orleans area. First, not a single owner of such properties even sought to prepay under the preservation statutes. Tr. 596:3-9 (Test. of Alexander); 1103:10-13 (Test. of Kizzier). Second, by contrast, *after* enactment of HOPE, eight owners of Section 221 or 236 properties prepaid from February 1997 to June 2003. PX 124a (Def.'s Resp. to Pl.'s Interrogatories to Def. (July 5, 2005)) at 5-7. The government thus cannot show that other owners of Section 221(d)(3) properties in the New Orleans area succeeded in pursuing prepayment under the preservation statutes. The ripeness dispute consequently touches on peripheral aspects of plaintiff's proofs that an application to prepay under the preservation statute would have been futile.

The first set of contentions focuses on the requirement in ELIHPA and LIHPRHA that prepayment not lead to rental increases exceeding thirty percent of a tenant's monthly adjusted income, and refers to the testimony of Mr. Alexander. Pl.'s Br. at 35 (citing Tr. 610:7 to 611:11 (Test. of Alexander)); *see* § 1024(1), 102 Stat. at 3270-71; 12 U.S.C. § 4108(a)(1)(A)(i). In response to plaintiff's counsel's question as to whether tenants of Section 221(d)(3) properties could have "afforded to pay the rents charged by conventional properties," Mr. Alexander said: "Not without having received Section 8 vouchers, it is highly unlikely, no." Tr. 610:20-24 (Test. of Alexander). The government points out that the question Mr. Alexander was asked was neither specific to 1991 nor to CCA, and argues that his statement that such tenants would be "unlikely" to be able to afford market rents is not

sufficient to establish futility. Def.'s Reply at 7-8. In this respect, viewed in the context of the immediately preceding questions, Mr. Alexander's testimony was focused on the period 1990 to 1995, *see* Tr. 609:5 to 610:19 (Test. of Alexander), and his answer covered the universe of tenants in Section 221(d)(3) housing in the New Orleans metropolitan area, CCA included. *See* Tr. 609:5 to 610:19 (Test. of Alexander). The government asserts that Mr. Alexander's answer-"highly unlikely, no"-is insufficient to prove ripeness, suggesting that only an unqualified "no" would satisfy the statutory criterion. Def.'s Reply at 7-8. Mr. Alexander's unrebutted testimony, however, was based on his experience as the director of the Division of Housing Management in HUD's New Orleans office from the late 1980s until January 1995, and his testimony showed that he was generally quite knowledgeable about the types of tenants living in Section 221(d)(3) properties and specifically familiar with Chateau Cleary. Tr. 496:25 to 497:24, 498:7-12 (Test. of Alexander).[21] LIHPRHA's plain language banned prepayment if the rent of "*any* current" CCA tenant would exceed thirty percent of her adjusted income as a result of prepayment. *See* 12 U.S.C. § 4108(a)(1)(A)(i) (emphasis added).[22] Mr. Alexander's

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[21] Just as the Federal Circuit in *Cienega VI* relied, in part, on the opinion of a former HUD official as to whether the plaintiff would have met the preservation statutes' statutory criteria for prepayment, *Cienega VI*, 265 F.3d at 1243, 1246, this court bases its decision on this point on Mr. Alexander's unrebutted testimony.

[22] ELIHPA, as amended, barred prepayment if "*a* current tenant['s]" rent increased beyond thirty percent of her adjusted

testimony is sufficient to establish to "a reasonable degree of certainty" that prepayment would have caused *one* CCA tenant's rent to increase beyond the threshold of thirty percent of her adjusted income. *See Palazzolo,* 533 U.S. at 620, 121 S.Ct. 2448 ("once ... the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened"); *accord Anaheim Gardens v. United States,* 444 F.3d 1309, 1315-16 (Fed. Cir. 2006); *Cienega VI,* 265 F.3d at 1246.

In addition, both plaintiff's economic and real estate expert, Dr. Ragas, and the government's real estate expert, Mr. Lewis J. Derbes, concurred that the rents CCA could have charged upon prepayment in May 1991 would have exceeded the ten percent threshold. *See* PX 106 (second Ragas report) at 39; PX 100 (Expert Report of Lewis J. Derbes (Mar. 7, 2005)) ("Derbes report") at 66; Tr. 841:3-16 (Test. of Ragas), 1492:17 to 1493:13 (Test. of Derbes). Dr. Ragas estimated CCA's market rents would have exceeded its HUD-restricted rents by between twenty-nine and thirty-nine percent, depending on the unit type, *see* PX 106 (second Ragas report) at 39; Tr. 841:3-16 (Test. of Ragas), while Mr. Derbes estimated a differential between sixteen and twenty-nine percent, depending on the unit type. PX 100 (Derbes report) at 66; Tr. 1492:17 to 1493:13 (Test. of Derbes).

The government objects that this evidence should

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income. *See* § 1024(1), 102 Stat. at 3270 (emphasis added). The meaning is essentially the same as that in LIHPRHA-if a single tenant's rent would exceed the statutory cap, prepayment was not permitted. *Compare* 12 U.S.C. § 4108(a)(1)(A)(i) ("any current tenant"), *with* § 1024(1), 102 Stat. at 3270 ("a current tenant").

be disregarded because both experts' estimates assumed that CCA would incur "significant expenditures for improvements and upgrades, which would in turn result in higher rents after prepayment." Def.'s Post-Trial Reply Brief ("Def.'s Reply") at 4. The government claims that a "well-conceived plan of action to prepay would include *no* project upgrades." *Id.* at 4 (emphasis added); *accord* Def.'s Br. at 26. Expenses for improvements were incorporated by Dr. Ragas and Mr. Derbes into their analyses. *See* PX 106 (second Ragas expert report) at 17-19; PX 100 (Derbes expert report) at 74. The improvements contemplated by Dr. Ragas and Mr. Derbes were relatively minor, *see* Tr. 857:11-16 (Test. of Ragas); Tr. 1402:20 to 1404:4 (Test. of Derbes), reflecting those accomplished by CCA upon prepayment, *see* Tr. 269:5 to 270:21; 272:22 to 273:9 (Test. of Norman), not even extending so far as the "minor rehabilitation" considered by Mr. Alexander in his third option.[23] These minor steps provide no basis to claim that the experts' analyses of rent increases on prepayment were inappropriate at Chateau Cleary. *See* DX 140 (Alexander report) at 139.

In a similar vein, the government attempts to graft another requirement onto the regulatory agreement and the preservation statutes by suggesting that CCA should have sought annual

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[23] Instructively, even LIHPRHA's appraisal process for determining a HUD-regulated property's fair market value required the incorporation of the costs of converting the property to market-rate rental housing. *See* 12 U.S.C. § 4103(b).

rent increases under the regulatory agreement. *See* Def.'s Reply at 4-5. If CCA had sought these increases prior to prepayment, the government argues, its HUD-regulated rents would have been within ten percent of market rents and prepayment would not have been precluded under ELIHPA and LIHPRHA. *See id.* The government then goes further: "Given that the difference between market rents and HUD-rents w[as] increasing during the 1990's, and given that [the] difference between CCA's HUD rents and market rents in 1998 was only 10 percent, the differential in 1991 was *necessarily* less than 10 percent." *Id.* at 26 (emphasis added). The government's argument implies that, at least if CCA planned to prepay, it was violating the relevant HUD regulations and its regulatory agreement by *not* seeking the maximum rent increases that were permitted, but not guaranteed, by the regulatory agreement. *See* Def.'s Br. at 4-5; PX 2 (1969 regulatory agreement) ¶ 4(c); PX 29 (1985 regulatory agreement) ¶ 4(f). However, the regulatory agreements placed a cap on CCA's annual distribution; they did not mandate that CCA seek rent increases. PX 2 (1969 regulatory agreement) ¶ 6(e)(1); PX 29 (1985 regulatory agreement) ¶ 6(e)(1). The evidence at trial also rebuts the government's conclusory statement that CCA's rents were "necessarily less than 10 percent" below market rents in 1991. The New Orleans area suffered a marked economic decline in the late 1980s due to difficulties experienced by the petroleum industry, and rents remained relatively constant due to the restricted ability of tenants to pay rents. Tr. 155:18 to 156:12 (Test. of Norman). Also, Dr. Ragas testified that the market in the West Metairie and

surrounding areas in 1998 was far more competitive at the more expensive portion of the rental market than it was in 1991 due to an influx in the mid-to late-1990s of new apartment complexes with more attractive amenities than those in older properties, such as Chateau Cleary. Tr. 824:3 to 825:13, 829:2 to 830:20 (Test. of Ragas). The increased competition affected to some extent the rents CCA could demand after prepayment. Tr. 1063:13 to 1065:18 (Test. of Ragas). Thus, the link the government draws between market rents in 1998 and market rents in 1991 is unsupported by the trial record. In short, Mr. Alexander's testimony and CCA's proofs of market rental conditions in West Metairie and the New Orleans area show that CCA could not have satisfied the ten-percent requirement, and HUD would have had no discretion to allow CCA to prepay. *See* Tr. 610:20-24 (Test. of Alexander); PX 100 (Derbes report) at 66; PX 106 (second Ragas report) at 39; Tr. 841:3-16 (Test. of Ragas), 1492:17 to 1493:13 (Derbes); *see also Palazzolo,* 533 U.S. at 620-21, 121 S.Ct. 2448; *Anaheim Gardens,* 444 F.3d at 1316; *Cienega VI,* 265 F.3d at 1246.

ELIHPA and LIHPRHA both also precluded prepayment if it would "involuntarily displace current tenants (except for good cause) where comparable and affordable housing is not readily available." ELIHPA, § 225(a)(1), 101 Stat. at 1880; 12 U.S.C. § 4108(a)(1)(B). CCA argues that Chateau Cleary could not have satisfied this statutory criterion for prepayment. *See* Pl.'s Br. at 36. The government concedes that higher rents following prepayment would have led some Chateau Cleary tenants to move to other housing, Def.'s Reply at 8, but argues that a "well-designed plan of action" to

prepay would not have required the "eviction" of tenants, equating the statutory phrase "involuntarily displace" with "evict." *See id.* at 8-9; *see also* Def.'s Br. at 28.

The government's argument is without merit. The government's attempt to equate "involuntarily displace" with "evict" is unavailing. Although the terms "displace" and "evict" can both mean "to expel," *Webster's New Collegiate Dictionary* 241, 288 (7th ed. 1970), "evict" typically refers to the removal of a tenant by legal process. *Id.* at 288; *see also Black's Law Dictionary* 575 (7th ed. 1999). In any event, in housing statutes Congress drew a distinction between the terms "evict" and "involuntarily displace." *Compare* ELIHPA, Pub.L. No. 100-242, § 225(a)(1), 101 Stat. 1815, 1880 ("involuntarily displace"); LIHPRHA § 601(a), 104 Stat. 4079, 4256 (1990) (same), *with* ELIHPA §§ 119(d), 122, 123, 101 Stat. at 1831, 1840, 1846 ("evict" or "eviction"); Cranston-Gonzalez National Affordable Housing Act, Pub.L. No 101-625, §§ 411, 424(g)(1), 445(e), 501, 503(a), (b), 601, 104 Stat. at 4155, 4167, 4178, 4181, 4184-85, 4269 (same). The focus on "involuntarily displace" in the preservation statutes thus focuses on the effects of rent increases upon conversion to conventional rental housing after prepayment, not on the legal process of eviction. That focus was confirmed by evidence adduced at trial.

Mr. Alexander testified that, given his experience in HUD's New Orleans office, he "would ... have expected that [following prepayment] *at least some portion* of those 221[(d)(3)] tenants would have sought to live in other HUD properties and thus ha[ve] gone on to waiting lists that were

maintained." Tr. 611:12-21 (Test. of Alexander) (emphasis added); *see also* Tr. 610:11 to 611:11 (Test. of Alexander). Moreover, Mr. Norman, CCA's managing partner, testified that in 1991 comparable subsidized housing was five to eight miles away. Tr. 190:12, 191:12-22 (Test. of Norman). This evidence suffices to establish that the involuntary displacement criterion in ELIHPA and LIHPRHA for prepayment could not have been satisfied, making an application by CCA for prepayment futile. *See Palazzolo,* 533 U.S. at 626, 121 S.Ct. 2448; *Anaheim Gardens,* 444 F.3d at 1316; *Cienega VI,* 265 F.3d at 1246.

In sum, CCA has proven that it would have been futile to apply to HUD for prepayment of its mortgage under ELIHPA or LIHPRHA because HUD lacked the discretion to approve prepayment. Specifically, CCA proved that it could not have satisfied the statutory criteria mandating that prepayment was precluded where rent increases would (1) exceed ten percent or exceed thirty percent of a tenant's monthly adjusted income or (2) involuntarily displace current tenants. In this respect, CCA's experience appears to have been typical for owners of Section 221(d)(3) properties in New Orleans.

The government finally argues that CCA's claims are not ripe because it failed to seek incentives to remain in the HUD program or to pursue a sale to a HUD-approved buyer. Def.'s Br. at 30-31. CCA responds that it was not required to seek incentives or a HUD-approved sale and that any HUD-regulated sale would not have resulted in a fair market transaction at a fair market price. Pl.'s Br. at 37. As the Federal Circuit observed, "regulatory

takings cases based on contracts containing key guarantees later negated by Congress may be fundamentally different from those involving only the generalized 'regulatory environment' seen in earlier statutes, regulations, agency policies and practices, and industry understandings." *Cienega VIII,* 331 F.3d at 1354. As the government would have it, even if the preservation statutes barred CCA from prepaying, CCA should have sought incentives or a HUD-approved sale. Def.'s Br. at 30-31. But CCA's suit is based on the government's failure to allow CCA to prepay, not on the government's failure to provide alternatives to prepayment. *See Cienega IX,* 67 Fed. Cl. at 461; Compl. ¶¶ 3, 14, 39, 42. CCA chose not to seek incentives or sell under HUD-imposed restrictions. Tr. 198:21 to 200:7, 207:12 to 208:25 (Test. of Norman.). As Mr. Norman explained:

> [Seeking incentives] didn't come close to what we thought we were entitled to, based on ... living up to our end of the deal over the years. It would not have produced the return on equity, reduction in stress in management and expense that going market rent would have done.... It didn't equate to what we expected and lived up to all those years.... [W]e felt we had ... no reason not to be able to enjoy the fruits of the 20th year. So, it just was not a viable alternative, and it didn't satisfy our desires or our expectations.

Tr. 207:12 to 208:25 (Test. of Norman.). In effect, the government is arguing that for CCA to vindicate its right to prepay, it must have applied to receive something it did not want–government-provided alternatives. Def.'s Br. at 30-31; Tr. 198:21 to 200:7, 207:12 to 208:25 (Test. of Norman.).

Neither the regulatory agreement nor the preservation statutes mandated that CCA seek incentives or a HUD-approved sale. *See* PX 2 (1969 regulatory agreement); PX 29 (1985 regulatory agreement); ELIHPA §§ 224(b)(1), (7); 225(b)(3), 101 Stat. at 1880-81; 12 U.S.C. §§ 4108-11; *see also* Tr. 1081:2-8 (Test. of Kizzier) ("[Owners] had a lot of choices [under the preservation statutes].... They could choose *not* to come into the program.") (emphasis added). In short, CCA was not required "separately [to] seek incentives and receive a determination of whether those incentives would be funded." *See Cienega IX,* 67 Fed. Cl. at 462; *see also Cienega VI,* 265 F.3d at 1248. The government's argument to the contrary is unavailing.

CCA's claims are ripe for adjudication.

B. *Takings Analysis*

The Takings Clause of the Fifth Amendment specifies that " private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause "was designed to bar [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). In a regulatory takings case, a court must engage in a two-tiered inquiry. First, the court must examine whether the property owner possessed a "distinct property interest" at the time of the alleged taking. *Cienega VIII,* 331 F.3d at 1328; *Chancellor Manor,* 331 F.3d at 901. Second, the court must determine whether a compensable taking occurred. *Chancellor Manor,* 331 F.3d at 902. In the regulatory context, "[t]he general

rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922). To determine whether the regulation has "gone too far," the court conducts an "essentially ad hoc, factual inquir[y]" focused on three factors: (1) the character of the governmental action, (2) the degree of interference with the reasonable, investment-backed expectations of the property owner, and (3) the economic impact of the action. *See Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104, 124-28, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *see also Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 325-328, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002); *Palazzolo,* 533 U.S. at 634, 121 S.Ct. 2448 (O'Connor, J., concurring). None of the Penn Central factors is itself determinative, but rather all of the factors are to be weighed in a balance that takes into account all of the circumstances. *Palazzolo,* 533 U.S. at 635-36, 121 S.Ct. 2448 (O'Connor, J., concurring).

1. *CCA's property rights in Chateau Cleary.*

An owner's property rights compensable under the Fifth Amendment are defined by "existing rules or understandings" and "background principles" derived from independent sources, such as state statutes or common law. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1029-30, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Maritrans v. United States,* 342 F.3d 1344, 1352 (Fed. Cir. 2003) (*citing Board of Regents of State Colls. v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). CCA is the owner in fee simple of the land on which Chateau Cleary is built. PX 1 (Tomeny sale to

Norman brothers); PX 28A (J. Robert Norman sale to CCA); PX 33 (Ernest B. Norman, Jr. transfer to CCA). As an owner of land in fee simple, CCA possesses "inherent rights to rent [its] land at any price [it] can command." *Cienega VIII,* 331 F.3d at 1328-29.[24] By signing the regulatory agreement and assenting to HUD restrictions on tenants and rent, CCA agreed–for a limited time–to constrain the property rights it was otherwise entitled to exercise, all the while retaining a valid property interest for all purposes, including for the Takings Clause. *See Chancellor Manor,* 331 F.3d at 902-03; *Cienega VIII,* 331 F.3d at 1329; *Wyatt v. United States,* 271 F.3d 1090, 1097 (Fed. Cir. 2001); PX 2 (1969 regulatory agreement); PX 29 (1985 regulatory agreement).

CCA also possesses contractual rights cognizable under the Takings Clause. *See Cienega VIII,* 331 F.3d at 1329 ("[T]here is also ample precedent for acknowledging a property interest in contract rights under the Fifth Amendment"). CCA's regulatory agreement incorporated by reference the mandates of Section 221(d)(3) and the associated regulations, which included the right to prepay the mortgage after 20 years. See PX 2 (1969 regulatory agreement), undesignated second paragraph; 24 C.F.R. § 221.524(a)(1)(ii) (1969); PX 29 (1985 regulatory agreement), undesignated second paragraph; 24 C.F.R. § 221.524(a)(1)(ii) (1985). Under the regulatory agreement, CCA had

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[24] The government effectively concedes that CCA possessed vested property rights in Chateau Cleary by not disputing this fact at trial. *See* Def.'s Br. at i-iv; Def.'s Reply at i-iii; Def.'s Supplemental Post-Trial Brief at 1-3.

"unequivocal contractual rights after twenty years to prepay [its] mortgage[ ]." *See Cienega VIII,* 331 F.3d at 1330. Those rights vested when the Norman brothers, and later CCA, signed the regulatory agreements in 1969 and 1985. *Cienega VIII,* 331 F.3d at 1330 ("contract rights vested when the contracts were signed"); *see* PX 2 (1969 regulatory agreement); PX 29 (1985 regulatory agreement).

2. *Penn Central analysis.*

a. *Character of governmental action.*

In analyzing the first of the *Penn Central* factors, the character of the governmental action, a court must "consider the purpose and importance of the public interest reflected in the regulatory imposition[, and] balance the liberty interest of the private property owner against the [g]overnment's need to protect the public interest through imposition of the restraint." *Cienega VIII,* 331 F.3d at 1337-38 (quoting *Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171, 1176 (1994)). This analysis focuses not only on the intended benefits of the governmental action, but also on whether the burdens the action imposed were borne disproportionately by relatively few property owners. *Cienega VIII,* 331 F.3d at 1338-40; *see also Armstrong,* 364 U.S. at 49, 80 S.Ct. 1563; *Cienega IX,* 67 Fed. Cl. at 466.

The government argues that the preservation statutes did not have the character of a taking because they promoted an important governmental objective-ensuring that subsidized housing remained in place for thousands of poor families. Def.'s Br. at 46-48. The government also avers that the preservation statutes did not institute improper

burden-shifting because they offered owners alternatives such as a HUD-approved sale and financial incentives to remain in the HUD programs. *Id.* at 48-49. CCA counters that the preservation statutes disproportionately imposed the burden of maintaining low-income housing on CCA and other owners of subsidized low-income housing. Pl.'s Br. at 38-39.

The expressly stated goal of ELIHPA and LIHPRHA was to extend the availability of low-income housing. *Cienega VIII,* 331 F.3d at 1338-40; *Chancellor Manor,* 331 F.3d at 905-06; ELIHPA § 202(b)(1)-(2), 101 Stat. at 1878; Tr. 1079:11-17, 1080:16-20 (Test. of Kizzier) ("Congress passed Title [II] to extend affordable housing. They had thought with prepayments, [Sections] 236 and [221(d)(3)], that there were going to be a lot of poor people out on the street without housing."). The method for implementing this goal was in effect to bar owners from prepaying their mortgages, forcing them to remain in the housing programs. *Cienega VIII,* 331 F.3d at 1335 ("ELIHPA and LIHPRHA directly and intentionally abrogated the contracts."). That retaining Section 221(d)(3) properties under HUD regulations was the key aim of the government was further emphasized after the passage of HOPE by HUD's issuance of preservation letters which sought to impede prepayment. *See* PX 63 (Preservation Letter No. 2) at 3 (prepayment required HUD approval); PX 65 (Preservation Letter No. 4), Preservation Questions and Answers, at 2-6 (three-year moratorium on rent increases for low-income housing in low-vacancy areas; owner required to pay fifty percent of the relocation expenses of any tenant); PX 67 (Preservation Letter No. 6),

Preservation Questions and Answers at 3, 6-7 (three-year moratorium on rent increases for low-income housing in low-vacancy areas). The government argues that ELIHPA and LIHPRHA were promoting important government policies, Def.'s Br. at 47, but, as the Federal Circuit explained, that fact does not justify abrogating owners' prepayment rights:

> Congress' *purpose* in enacting the statutes may have been entirely legitimate but the government has not shown that the *actions* Congress took-the enactment of ELIHPA and LIHPRHA-were within its powers to exercise without also granting compensation. The disproportionate imposition on the Owners of the public's burden of providing low-income housing is not rendered any more acceptable by worthiness of purpose.

Cienega VIII, 331 F.3d at 1340.

The preservation statutes did not place the burden of maintaining low-income housing on all taxpayers, but instead targeted only the owners of low-income housing whose regulatory agreements included the right to prepay their mortgages after twenty years. *See Cienega VIII,* 331 F.3d at 1338-39; PX 2 (1969 regulatory agreement), undesignated second paragraph; PX 29 (1985 regulatory agreement), undesignated second paragraph; *cf. Centex Corp. v. United States,* 395 F.3d 1283, 1306 (Fed. Cir. 2005) (legislation deemed targeted when it " was directed at a small and specifically identified group of taxpayers having contracts with the government ... and ... was designed to reduce the cost of those contracts to the government.").

The Federal Circuit described the burden-shifting that ELIHPA and LIHPRHA imposed on owners of

Section 221(d)(3) and Section 236 properties, such as CCA, as follows:

> The character of the government's action is that of a taking of a property interest, albeit temporarily.... Unquestionably, Congress acted for a public purpose (to benefit a certain group of people in need of low-cost housing), but just as clearly, the expense was placed disproportionately on a few private property owners. Congress' objective in passing ELIHPA and LIHPRHA–preserving low-income housing–and method–forcing some owners to keep accepting below-market rents–is the kind of expense-shifting to a few persons that amounts to a taking. This is especially clear where, as here, the alternative was for all taxpayers to shoulder the burden. Congress could simply have appropriated more money for mortgage insurance and thereby induced more developers to build low-rent apartments in the public housing program to replace housing, such as the plaintiffs', that was no longer part of the program.

Cienega VIII, 331 F.3d at 1338-39 (footnote omitted); *see also* S.Rep. No. 101-316, at 10, *reprinted in* 1990 U.S.C.C.A.N. 5763, 5869 ("the most cost-effective strategy available to the government" to resolve the low-income housing problem is to seek to retain existing owners in the HUD-subsidized programs). Mr. Alexander, the former HUD official, contrasted that chosen solution of the preservation statutes to the "enhanced vouchers" that HUD employed after the passage of HOPE, which vouchers spread the burden much more broadly. Tr. 594:8-23 (Test. of Alexander).

Despite the Federal Circuit's clarity in addressing the governmental action involved in the preservation statutes, the government avers that the preservation statutes did not inappropriately shift the burden of providing low-income housing to owners, such as CCA. Pointing to the financial incentives offered to remain in the HUD programs and the opportunity to sell the property to HUD-approved buyers, *see* Def.'s Br. at 48-49, the government contends that the benefits offered to owners under the preservation statutes offset any burden imposed on them. *Id.*[25]

The government's arguments are fatally flawed. First, the congressional materials actually demonstrate the inherent conflict between the public purpose of the preservation statutes–maintaining affordable low-income housing–and the owners' property rights. *See Cienega VIII,* 331 F.3d at 1340. Second, by allowing HUD to control CCA's tenant pool beyond the twenty-year mark, the preservation statutes created a situation analogous to a physical invasion or a holdover tenancy. *Cienega VIII,* 331 F.3d at 1338 ("We agree that the enactment of

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[25] The government cites congressional committee reports on the bills that became the preservation statutes to support its contention that Congress was attempting to balance the private interests of the owners with the public interest, providing affordable low-income housing. The Senate committee report accompanying the bill that became LIHPRHA stated: "A Federal preservation strategy is, by far, the most cost-effective strategy available to the government and, if structured correctly, can be accomplished in a way that protects the interests of the owners, the tenants and the communities in which the housing is located." Sen. Rep. No. 101-316, *reprinted in* 1990 U.S.C.C.A.N. 5763, 5869.

ELIHPA and LIHPRHA could fairly be characterized as akin to this type of physical invasion."); *Cienega IX,* 67 Fed. Cl. at 467; *see also United States v. General Motors Corp.,* 323 U.S. 373, 380, 65 S.Ct. 357, 89 L.Ed. 311 (1945) (addressing federal government's taking of temporary use of property held under long-term lease). By losing its right to prepay its mortgage, CCA effectively was forced to house HUD-approved tenants in Chateau Cleary, rather than tenants of its own choosing. *See Cienega IX,* 67 Fed. Cl. at 467; Tr. 186:4-6 (Test. of Norman) (the preservation statutes affected CCA's freedom to rent to "all categories of tenants"). This barring of CCA's right to exclude has the character of a taking. *Cienega VIII,* 331 F.3d at 1338; *Cienega IX,* 67 Fed. Cl. at 467.

Third, the incentives themselves had characteristics of a taking. ELIHPA and LIHPRHA took from CCA the right to sell its property on the open market to a buyer of its choosing. Tr. 186:1-3 (Test. of Norman). Under ELIHPA, before approving a sale of a Section 221(d)(3) property, the Secretary was required to make findings at least as stringent as those required for prepayment. *Compare* ELIHPA §§ 224(b)(7), 225(b), 101 Stat. at 1880-81, *with* ELIHPA § 225(a), 101 Stat. at 1880. Prospective buyers would have been required to rent at below-market rents. *See* ELIHPA §§ 224(b)(7), 225(b), 101 Stat. at 1880-81. Under LIHPRHA, a sale of Chateau Cleary would have required that Chateau Cleary be retained for very-low, low-, and moderate-income tenants "for the remaining useful life" of the property, *see* 12 U.S.C. § 4112(a)(2)(A), that Chateau Cleary not be sold for more than a HUD-regulated price, *see* 12 U.S.C. §§ 4110(b)(1), (c), 4105(b)(2)(B),

and that Chateau Cleary only be sold to HUD-approved buyers. *See* 12 U.S.C. §§ 4110(b)(1), (c), 4116. These restrictions on CCA's right to sell its own property constitute fundamental impingements on CCA's property rights. *See Cienega VIII,* 331 F.3d at 1338; *Cienega IX,* 67 Fed. Cl. at 467-68; *cf. Hodel v. Irving,* 481 U.S. 704, 716, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987) (statute that virtually abrogated appellees' right to devise a portion of their land was an "extraordinary" governmental action amounting to a taking).[26]

Fourth, the fact that the owners of Section 221(d)(3) properties received various benefits from participating in the Section 221(d)(3) program, such as a below-market interest rate loan, *see* Def.'s Reply

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[26] The government disputes CCA's assertion that under the preservation statutes CCA could not have sold Chateau Cleary at a fair market price. Def.'s Reply at 11. Putting aside that this issue is immaterial because CCA was not required to seek a sale under the HUD restrictions, the government's argument fails on its own terms. The government points to a provision in LIHPRHA stating that in a HUD-approved sale the "preservation value" would be determined through an appraisal process based on the "fair market value of the housing based on the highest and best use of the property." *Id.;* 12 U.S.C. § 4103(b)(2). Conducting an appraisal, however, particularly one under the strictures imposed by LIHPRHA, does not itself guarantee that a seller will receive fair market value. Tr. 1873:11 to 1874:8 (Test. of Dr. Robert Stillman) ("an appraisal process may or may not produce" a sale at fair market value); *see also* Tr. 640:13-18 (Test. of Alexander) (sales under the preservation statutes and sales under a "fair market process" were "very different processes"). Moreover, the HUD restrictions on the eligible buyers and on the future use of the properties, *see* 12 U.S.C. §§ 4112(a)(2)(A), 4110(b)(1), (c), 4116, would reduce the number of potential buyers and in all likelihood the price that CCA could have sought for Chateau Cleary.

at 15-16, does not alter the character of the governmental action. CCA received those benefits in exchange for its agreement to abide by certain restrictions for twenty years. Those restrictions included limiting occupancy to low- or moderate-income families, charging rents according to a HUD-approved rental schedule, and refraining from conveying the property without HUD approval, *during the twenty-year period*. *See* PX 2 (1969 regulatory agreement); ¶¶ 4(b), 5(c), 6(c); PX 29 (1985 regulatory agreement), ¶¶ 4(b), (f), 6(c). The government in effect unilaterally expanded the bargain that it struck with the Norman brothers in 1969 and CCA in 1985 by extending its duration. The government thus claims that the benefits it provided to CCA (*e.g.,* a below market loan) were given in exchange for CCA's agreement to *two* types of restrictions: (1) those contained in the regulatory agreement, and (2) any subsequent ones the government chose to impose, such as abrogation of CCA's prepayment rights. In *Cienega VI,* in rejecting the government's argument that the plaintiffs possessed no property interest cognizable under the Takings Clause, the Federal Circuit emphatically rejected the sort of retroactive alteration of CCA's contractual right to prepay that the government advocates here. *Cienega VIII,* 331 F.3d at 1331. The government's analogous argument that the incentives available under the preservation statutes mitigated the taking character of those statutes is similarly unavailing.[27]

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[27] To the extent that the government suggests that the incentives to remain in the Section 221(d)(3) program or to sell Chateau Cleary would have compensated CCA for the

b. *Reasonable investment-backed expectations of Chateau Cleary's owners.*

Under the second factor identified in *Penn Central,* the court must consider "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central,* 438 U.S. at 124, 98 S.Ct. 2646. Examination of this factor is intended to "limit recoveries to property owners who can demonstrate that 'they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.' " *Cienega VIII,* 331 F.3d at 1345-46 (quoting *Loveladies,* 28 F.3d at 1177). Beyond these actual, subjective expectations, an owner must demonstrate that his or her expectations were reasonable. *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1005-06, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984). Thus, a court must first verify that the property owner actually had investment-backed expectations and then examine whether those expectations were objectively reasonable. *Cienega VIII,* 331 F.3d at 1346; *but see*

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preservation statutes' abrogation of CCA's property rights, that argument, too, is rejected. The value of the options available under the preservation statutes might affect the just compensation due a plaintiff who has suffered a regulatory taking, to the extent the owner realized value from one or more options, but the existence of the options does not affect the takings analysis itself. *See Independence Park Apts. v. United States,* 449 F.3d 1235, 1246-48 (Fed. Cir. 2006) ("*Independence Park III*"), *on reconsideration,* 465 F.3d 1308, 1311-12 (Fed. Cir. 2006) ("*Independence Park IV*"); *Cienega IX,* 67 Fed. Cl. at 470 ("[V]alue provided by extrinsic means, as, for example, by statutory options that previously did not inhere in and with the property should not be made part of the takings analysis but rather should be part of the just-compensation calculus.").

Chancellor Manor, 331 F.3d at 904 ("The subjective expectations of the [owners] are irrelevant."). In the context of the preservation statutes, the court must determine "whether a reasonable developer confronted with the particular circumstances facing the [o]wners would have expected the government to nullify the twentieth-year prepayment right in the mortgage contract and in the regulations." *Cienega VIII,* 331 F.3d at 1346; *Chancellor Manor,* 331 F.3d at 904 ("The critical question is what a reasonable owner in the [plaintiffs'] position should have anticipated.") (citing *Commonwealth Edison Co. v. United States,* 271 F.3d 1327, 1348 (Fed. Cir. 2001) (en banc)).[28]

Mr. Norman stressed the importance of the prepayment right in 1969, when the Norman brothers-Mr. Norman's father and uncle-bought the land on which Chateau Cleary was constructed and signed the regulatory agreement with HUD. Tr. 54:1 to 57:23 (Test. of Norman). Mr. Norman testified that, coupled with the ability to obtain a non-recourse loan, the right to prepay the mortgage after twenty years was the central feature of the deal that the Norman brothers struck with HUD to take over the low-income housing project from a group of local

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[28] The relevant time frame for measuring an owner's investment-backed expectations is that "at which the [owner] entered into the activity that triggered the obligation, specifically when the [owners] entered the programs." *Chancellor Manor,* 331 F.3d at 904 (internal citations omitted). For CCA, the relevant time periods are 1969 to 1971, when the Norman brothers signed the relevant notes, mortgages, and the regulatory agreement, and 1985, when CCA signed the second regulatory agreement.

developers. Tr. 54:1 to 57:23, 80:5-14, 94:23 to 95:1 (Test. of Norman) (noting the prepayment "prize at the end of the 20 years"). HUD officials highlighted the prepayment right as an inducement to convince the Norman brothers to accept the deal and enter the subsidized housing program. *See* Tr. 57:18 to 58:15 (Test. of Norman); *cf. Cienega VIII,* 331 F.3d at 1346-47 (the prepayment right "was one of the primary incentives HUD offered precisely to encourage [the owners'] voluntary participation in the ... housing programs"). Noting the meager returns permitted to a limited dividend corporation under the Section 221(d)(3) program, Tr. 77:3-7, 93:5-9, 94:18 to 95:1 (Test. of Norman), Mr. Norman emphasized that the prepayment right was the "engine that drove" the Norman brothers' decision and that the brothers "wouldn't have done [the deal] without it." *See* Tr. 56:9 to 57:17, 80:5-14, 94:23 to 95:1 (Test. of Norman); *see also* Tr. 57:18-23 (Test. of Norman) (without the prepayment right "the project would not have gone forward").

For the Norman brothers, the ability to prepay the mortgage after twenty years was an integral part of a long-term strategy. Foreseeing that prepayment eventually would allow them to convert a HUD-restricted property to a conventional property, the Norman brothers chose in 1969 to invest in a property in West Metairie, then considered to be in the path of future development in the New Orleans area and an emerging middle-class neighborhood. Tr. 60:3 to 61:17, 95:7-12 (Test. of Norman), 1475:2-14 (Test. of Derbes). As Mr. Norman explained:

> There was a plan. And the plan was you spend more money, you build a better product, you put it in an area where nobody else is building

> subsidized housing, you wait for the growth and the 20th year, you pay your dues to society, and you then take that asset that's grown and you nurtured, and you have it turned around and start realizing your equity on that value.

Tr. 57:8-17 (Test. of Norman). In making this assessment of the long-term value of investing in West Metairie, the Norman brothers relied not only on their own experience, but also on the advice of local builders and consultants. Tr. 60:3 to 62:21 (Test. of Norman). In short, the Norman brothers planned, expected, and intended to prepay the mortgage on Chateau Cleary after twenty years. Tr. 67:15-22 (Test. of Norman).

In 1985, CCA acquired Chateau Cleary from the Norman brothers. PX 28A (J. Robert Norman's sale to CCA); PX 33 (Ernest B. Norman, Jr. transfer to CCA). CCA purchased J. Robert Norman's fifty percent interest for $677,550 "based on what it would be worth slightly discounted in 1991, when it would be converted to a market rate apartment complex," Tr. 163:17-20 (Test. of Norman), and signed a new regulatory agreement with HUD. PX 29 (1985 regulatory agreement). With prepayment eligibility only six years away when CCA purchased J. Robert Norman's share, CCA had the prepayment right firmly in mind. Tr. 174:15-20 (Test. of Norman). CCA's plan was the same as the Norman brothers'–to prepay the Chateau Cleary mortgage at the twenty-year point, raise the rents to market levels, and operate the apartment complex free of HUD restrictions. Tr. 174:21 to 175:25 (Test. of Norman). Thus, CCA's investment was backed by the partnership's subjective expectation that it

would be able to prepay its mortgage. *See* Tr. 174:15 to 175:25 (Test. of Norman); *Cienega VIII,* 331 F.3d at 1346.[29]

CCA's investment-backed expectations also were objectively reasonable. The prepayment right was legally binding on the government. The secured notes in 1969 and 1971 were endorsed by HUD and referred specifically to CCA's right to prepay its mortgage after twenty years. PX 3 (1969 note); PX 5 (1971 note). The regulatory agreements referred to the requirements of Section 221(d)(3) and the associated regulations, which, in 1969 and in 1985, included the right to prepay the mortgage after twenty years. *See* PX 2 (1969 regulatory agreement), undesignated second paragraph; 24 C.F.R. § 221.524(a)(1)(ii) (1969); PX 29 (1985 regulatory agreement), undesignated second paragraph; 24 C.F.R. § 221.524(a)(1)(ii) (1985). The associated mortgages, completed on HUD forms, incorporated by reference the terms of the notes and the regulatory agreement. PX 4 (1969 mortgage), first undesignated paragraph, ¶ 3; PX 6 (1971 mortgage), first undesignated paragraph, ¶ 3. Given that the prepayment right was an integral part of the bargain that owners of Section 221(d)(3) housing struck with HUD, the expectation of the Norman brothers and CCA that the government would not abrogate this

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[29] The government generally does not contest CCA's claim that the Norman brothers and CCA expected to be able to prepay the Chateau Cleary mortgage after twenty years, but rather it disputes whether these expectations were objectively reasonable. *See* Def.'s Br. at 39-46; Def.'s Reply at 17-22; *but see* Def.'s Reply at 20 (referring to Mr. Norman's testimony as to the Norman brothers' investment-backed expectations as "self-serving.").

right, *see* Tr. 79:12 to 80:14, 175:3-8 (Test. of Norman), was reasonable. *See Cienega VIII,* 331 F.3d at 1348-49. Having the opportunity to terminate HUD-regulated rents at and after the twenty-year anniversary "would be a significant factor in the calculation of total profit that could be expected over the lifetime of the investment in the property." *Id.* at 1349.[30] HUD's role in the deal that led to the Norman brothers' entry into the Section 221(d)(3) program and HUD's use of the prepayment right as an inducement in that process, confirms that the prepayment right was a material part of the bargain. *See* Tr. 57:18 to 58:15 (Test. of Norman); *cf. Cienega VIII,* 331 F.3d at 1346-47 (the prepayment right "was one of the primary incentives HUD offered precisely to encourage [the owners'] voluntary participation in the ... housing programs.").[31]

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[30] The possibility that the Section 221(d)(3) program might be altered by statute or regulation does not undercut the reasonableness of a property owner's expectation. *See Cienega VIII,* 331 F.3d at 1349 ("Because without the prepayment right the developers might have earned more profit investing elsewhere and therefore have declined to enter the programs, abrogation of this right would not reasonably be expected simply because the regulations were amendable or subject to legislative alteration.").

[31] CCA possessed documents that are nearly identical to those in *Cienega VIII* and *Chancellor Manor* and that incorporated the twenty-year prepayment term. *Compare* PX 2 (1969 regulatory agreement), undesignated second paragraph; PX 3 (1969 note); PX 4 (1969 mortgage); 24 C.F.R. § 221.524(a)(1)(ii) (1969); PX 5 (1971 note); PX 6 (1971 mortgage); PX 29 (1985 regulatory agreement), undesignated second paragraph; 24 C.F.R. § 221.524(a)(1)(ii) (1985), *with Cienega VIII,* 331 F.3d at

The objective reasonableness of the Norman brothers' and CCA's expectations was also evident from the site visit. Chateau Cleary is close to an interchange to Interstate 10, which provides a major transportation corridor to and from New Orleans proper. The property is located in a largely residential neighborhood made up of well-maintained homes. Two other conventional apartment complexes are nearby, one of which is relatively new and the other of which was constructed a few years after Chateau Cleary. Regional shopping centers and major hospitals are readily accessible. Schools are good, and the area has a relatively low incidence of crime. Moreover, Chateau Cleary was well built and is well maintained, the structural integrity of its construction having been demonstrated by, among other things, the fact that it suffered virtually no damage as a result of Hurricane Katrina in 2005. The Chateau Cleary complex is well positioned to be, and is, a viable competitor in the conventional rental housing market, reflecting its favorable location, design, and construction.[32]

Faced with this evidence, to shore up its

1325-26 *and Chancellor Manor,* 331 F.3d at 894-95; *see also Cienega IX,* 67 Fed. Cl. at 473 (citing deed of trust notes incorporating the plaintiffs' right to prepay their mortgage after twenty years).

[32] At the time of the site visit in September 2006, Chateau Cleary had cut off its waiting list for available apartments at 250 names. This reflection of high demand can be attributed in substantial part to the property's having withstood Hurricane Katrina.

contention that the owners' expectations were not objectively reasonable, the government contests the idea that a property owner would be interested in realizing a property's residual value after twenty years. The government defines such realization as the value of selling the property or converting it to more profitable use. Def.'s Br. at 44-45. In support of this argument the government quotes from a treatise on low-income housing:

> [N]ormally a developer of real estate hopes to make a profit on the sale of the property at some time in the future. He hopes that the property's residual value will be such that he is able to recover his total equity investment ..., plus an additional profit by reason of appreciation. There are several reasons why in normal course this expectation might not be realized in federally-assisted housing.

Def.'s Br. at 44-45 (quoting Charles L. Edison & Bruce S. Lane, *A Practical Guide to Low- and Moderate-Income Housing* 11:6 (1972) (read into the record at trial, Tr. 1192:13-24)). The quoted text, however, does not adequately address the circumstances of this case, failing to identify *when* a sale is unlikely to recover the owner's total equity investment plus a profit (*e.g.,* after five years, twenty years, or forty years). Prepayment focuses explicitly on a twenty-year time horizon. The quoted passage also refers only to a scenario under which the owner of subsidized housing *sells* the property and does not consider the value of retaining the property after conversion into a market-rate property. The long-term plan for CCA was not to sell Chateau Cleary upon prepayment, but to convert it into a conventional apartment complex. *See* Tr. 60:3 to

61:17, 95:7-12 (Test. of Norman); *cf. Cienega IX*, 67 Fed. Cl. at 472 (citing plaintiffs' long-term plans to prepay and convert their properties to market-rate rentals). Most importantly, the government's argument fails for a far more fundamental reason: the pertinent question is not whether it was reasonable for CCA to expect "to recover [its] total equity investment" plus a profit at or by any given time, Def.'s Br. at 45, but rather whether it was reasonable for CCA to expect that the government would honor the prepayment terms of the contract. *See Cienega VIII*, 331 F.3d at 1348.

The government next repeats an argument made in *Cienega IX*—that CCA's investment-backed expectations were not reasonable because the principal motivating factors for a developer of a HUD-subsidized complex were the "immediate subsidies and incentives" HUD provided, not the right to prepayment. *See* Def.'s Br. at 40. The government cites the testimony of Mr. Malek, a tax accounting expert, who described various advantages of investing in Section 221(d)(3) housing.[33] The advantages Mr. Malek cited included the ability to obtain a highly-leveraged loan, to be credited for the Builder's Allowance that reduced an investor's initial cash investment, and to opt to use accelerated depreciation (which depreciation method could be applied to all buildings, subsidized or not, prior to tax legislation in 1986). Tr. 1160:12-19, 1161:3-6, 1166:7-11, 1173:20 to 1176:1 (Test. of Malek).[34]

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[33] Mr. Malek was retained by the government and was qualified as an expert in tax accounting. Tr. 1155:3-10.

[34] The government also insists that among the benefits CCA

CCA does not dispute these benefits, but points to the very limited actual returns realized by Chateau Cleary during its HUD-subsidized tenure and argues that the prepayment right "had unique value" because it offered the prospect of much higher returns after prepayment when the property could enter the conventional market. Pl.'s Reply at 10. For conservative investors such as the Norman brothers and CCA, a very low immediate return was an acceptable price to pay for a much greater future return. The government's endeavor to give undue weight to instant economic gratification while according none to longer-term horizons fails. Moreover, the paucity of the return available during the HUD-subsidized years undercuts even the government's short-term arguments. The investment-backed expectations of Chateau Cleary's owners were objectively reasonable.

c. *Economic impact.*

The third factor in the *Penn Central* test addresses the severity of the economic impact of the regulatory action on the property owner, *see Penn Central,* 438 U.S. at 124, 98 S.Ct. 2646, and involves a "weigh[ing of] all the relevant considerations." *Yancey v. United States,* 915 F.2d 1534, 1541 (Fed. Cir. 1990). The consideration of economic impact is "intended to ensure that not every restraint imposed by government to adjust the competing demands of

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received were the fees its affiliated construction and management companies earned in building and managing Chateau Cleary. Def.'s Reply at 21. This argument is without merit. When asked about the management fees CCA's affiliated company earned, Mr. Norman explained: "If you don't do it [yourself], you have to pay somebody else to do it." Tr. 94:5-6 (Test. of Norman).

private owners [will] result in a takings claim." *Cienega VIII,* 331 F.3d at 1340 (alteration in original) (quoting *Loveladies,* 28 F.3d at 1176). Although courts must determine whether the plaintiff has suffered a "serious financial loss," *Loveladies,* 28 F.3d at 1177, there is no "automatic numerical barrier" below which compensation must be denied. *Yancey,* 915 F.2d at 1541.

Conceptually, courts have employed three different methods of measuring economic impact, depending on the circumstances. One method measures the value taken from the property by regulatory action against the overall initial value. *See Maritrans,* 342 F.3d at 1358 (upholding a trial court's decision to evaluate economic impact based on "the change in fair market value of [plaintiffs'] vessels"); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 497, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (When considering *Penn Central's* economic impact factor, a court must " compare the value that has been taken from the property with the value that remains in the property."). A second measure looks to the claimant's ability to recoup its capital. *See Rith Energy, Inc. v. United States,* 247 F.3d 1355, 1363 (Fed. Cir. 2001) ("In determining whether a taking is categorical, 'the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored.'") (quoting *Florida Rock Indus., Inc. v. United States,* 791 F.2d 893, 905 (Fed. Cir. 1986)). The third method examines a claimant's return on equity under a given regulatory regime in comparison to the return on equity that would be received but for the alleged taking. *See Penn Central,* 438 U.S. at 129, 98 S.Ct. 2646 ("capable of earning a reasonable

return"); *United States v. Pewee Coal Co.,* 341 U.S. 114, 115, 117-18, 119, 71 S.Ct. 670, 95 L.Ed. 809 (1951) (Black, J., plurality) (Reed, J., concurring in the judgment) (upholding award of just compensation to owner of a coal mine the government had occupied and operated for over five months); *Kimball Laundry Co. v. United States,* 338 U.S. 1, 7, 16, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949) (referring to "the record of its past earnings" and holding that the "proper measure of compensation [for a temporary taking] is the rental that probably could have been obtained"); *Rose Acre Farms, Inc. v. United States,* 373 F.3d 1177, 1188-89 (Fed.Cir.2004); *Cienega VIII,* 331 F.3d at 1342-43; *Chancellor Manor,* 331 F.3d at 905. The task of a trial court is to determine which method best measures the economic impact of the governmental action. *Rose Acre Farms,* 373 F.3d at 1190.

In *Cienega VIII,* the Federal Circuit applied the return-on-equity approach to a temporary taking similar in all respects to that at issue here. In *Cienega VIII,* the Court of Appeals compared the annual rate of return on the owners' real equity in their properties to the 8.5 percent return on "low-risk Fannie Mae bonds." *Cienega VIII,* 331 F.3d at 1342.[35] This approach "best measures the impact of

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[35] The government argues that the Federal Circuit accepted the return-on-equity approach used by the plaintiffs' expert "solely" 'in view of the lack of any specific challenge by the government of the trial court's findings or of the Model Plaintiffs' methods and data.'" Def.'s Reply at 28 (quoting *Cienega VIII,* 331 F.3d at 1345). This criticism is mistaken. The government quotes the Federal Circuit out of context and mischaracterizes the court's approach in *Cienega VIII.* First, the court did not modify the quoted phrase with the word

ELIHPA and LIHPRHA on" the owners of Section 221(d)(3) properties because the alleged taking involves lost streams of income at an operating property, not the physical transfer of a piece of undeveloped property to the government and the subsequent return of that property to the owner. *See Cienega IX,* 67 Fed. Cl. at 475. As the Federal Circuit explained:

> The Owners' theory of recovery is *not* that their fee simple estates were taken or their land rendered "valueless." The Owners' entitlement to compensation is based on the taking of the real property interests reflected in the mortgage loan notes and the Regulatory Agreements. The difference is that the Owners' loss of the contractual prepayment rights was both total and immediate. They were barred from the unregulated rental market and other more lucrative property uses.

Cienega VIII, 331 F.3d at 1344; *see also Independence Park III,* 449 F.3d at 1246, 1248 (where property owners had entered into long-term use agreements, remanding for application of a compensatory model that would "determine what

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"solely." It used instead the word "especially," meaning the court did not apply the return-on-equity approach merely because the government did not challenge that approach. *Cienega VIII,* 331 F.3d at 1345. Second, the Federal Circuit concluded that the trial court's findings of fact, which relied on the lost-profits analysis of the plaintiffs' expert, were "an appropriate foundation for the analysis of 'economic impact,'" and it rejected the government's diminution-in-value approach because it did not take into account that the plaintiffs had been "barred from the unregulated rental market and other more lucrative property uses." *Id.* 331 F.3d at 1341, 1344.

[the plaintiffs] lost by not being able to charge market-level rents" over the period covered by the use agreements); *Independence Park Apts. v. United States,* 61 Fed. Cl. 692, 707 (2004) ("*Independence Park I*") ("[T]he income-generating opportunity the property provided had been entirely lost during the period of the temporary taking, not just postponed."), *rev'd and remanded on other grounds, Independence Park III,* 449 F.3d at 1235. In the context of the preservation statutes, measuring the economic impact by assessing the change in fair market value runs the risk of substantially understating the effect on the owner's property interest. *Kimball Laundry,* 338 U.S. at 7, 69 S.Ct. 1434 (noting that if the change in market value "were taken to be the measure, there might frequently be situations in which the owner would receive no compensation whatever because the market value of the property had not decreased during the period of the taker's occupancy.").

In resisting the return-on-equity approach and favoring the change-in-value method of economic analysis, the government manifestly errs by suggesting that in *Cienega VIII* the Federal Circuit broke new ground in Fifth Amendment Takings Clause jurisprudence. Def.'s Reply at 28 (citing *Cienega VIII* as "the first case to ever reference the 'rate of return' analysis."). The return-on-equity approach was relatively novel at one time–over fifty years ago–but not today. Actions taken by the government during World War II led to a series of temporary takings cases that posed the issue. Those cases primarily focused on rental value for the short-term taking period, *see Kimball Laundry,* 338 U.S. at 5-12, 69 S.Ct. 1434; *United States v. Petty Motor*

Co., 327 U.S. 372, 374-81, 66 S.Ct. 596, 90 L.Ed. 729 (1946); *General Motors,* 323 U.S. at 379, 65 S.Ct. 357, treating the lost rental returns as an appropriate measure of the economic impact. In the last of the World War II cases, *Pewee Coal,* the Supreme Court confronted the takings claim of a plaintiff whose coal mine the government had occupied and operated in 1943. 341 U.S. at 115, 71 S.Ct. 670. The Court upheld a district court's award of just compensation to the plaintiff for a *negative* return; *i.e.,* "the portion of the operating loss which the court found attributable to Government operation of the mine." *Id.* at 115, 71 S.Ct. 670. Concurring in the judgment, and casting the vote that established a majority for the judgment, Justice Reed contrasted this focus on a return with the method that compared a change in market value:

> *Market value,* despite its difficulties, *provides a fairly acceptable test for just compensation when the property is taken absolutely.* But *in the temporary taking of operating properties, market value is too uncertain a measure to have any practical significance* .... The most reasonable solution is to award compensation to the owner as determined by a court under all the circumstances of the particular case.

Id. at 119-120, 71 S.Ct. 670 (Reed, J., concurring) (internal citations omitted) (emphasis added).[36] In

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[36] Justice Reed went on to say: "When, in a temporary taking, no agreement is reached with the owners, the courts must determine what payments the Government must make. Whatever the nature of the 'taking,' the test should be the constitutional requirement of 'just compensation.' However, there is no inflexible requirement that the same incidents must be used in each application of the test." *Pewee Coal,* 341 U.S. at

short, for a temporary taking of an operating property, the Supreme Court looked to returns over the period of the taking, not changes in market value.

Lower courts have reached similar conclusions in other takings cases. In *Wheeler v. City of Pleasant Grove,* 833 F.2d 267 (11th Cir. 1987), the Eleventh Circuit explained:

> In the case of a temporary regulatory taking, the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit. The landowner's compensable interest, therefore, is the *return* on the portion of fair market value that is lost as a result of the regulatory restriction.

833 F.2d at 271 (internal citations omitted) (emphasis added). *See also A.A. Profiles, Inc. v. City of Fort Lauderdale,* 253 F.3d 576, 584 (11th Cir. 2001) (lost income is the proper measure of compensation " when the property owner's losses are limited to the temporary use of its property and the concomitant income."); *Wheeler v. City of Pleasant Grove,* 896 F.2d 1347, 1351 (11th Cir. 1990) ("The unconstitutional taking which this court found compensable was not a denial of all use of the Pleasant Grove property, as the district court's computation of damages would imply," but the lost income that the plaintiff suffered.).

Nonetheless, the government further avers that a return-on-equity analysis provides only a "snapshot" at a given point in time and does not adequately take

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120-21, 71 S.Ct. 670 (Reed, J., concurring).

into account the duration of the taking. Def.'s Br. at 38. However, the government's proffered metaphor is mistaken and misleading. Rather than a snapshot, the return-on-equity approach more closely resembles a composite, long-exposure photograph taken over the entire period of the temporary taking. Because it covers the period of the temporary taking, it addresses the economic results over the whole of the pertinent time, not merely an instant within that period. As the Federal Circuit has stated, "the period of the alleged temporary taking ... is the relevant period for purposes of assessing the economic impact." *Seiber v. United States,* 364 F.3d 1356, 1371 (Fed. Cir. 2004). By contrast, as pointed out in *Cienega IX,* using the diminution-in-value approach in a case such as this could allow the government to take an owner's $10 million annual income stream from a $100 million property for four and a half years–yielding the government $45 million–and then assert that the owner had not suffered a severe economic impact because he or she had only been deprived of 45% of the value of his property. *Cienega IX,* 67 Fed.Cl. at 476. The estimate of Dr. Brett Dickey, an expert testifying on behalf of the government, provides a less extreme, but informative example. His diminution in value model estimated that CCA had only suffered an economic impact of 18.1 to 20 percent. DX 160 (Dickey report) at 12; Tr. 1627:16 to 1629:18 (Test. of Dickey). By its very nature, Dr. Dickey's model simply examined the decline in the value of Chateau Cleary caused by the preservation statutes, effectively assuming that the only value of Chateau Cleary to CCA was the value it could recover upon sale while ignoring the lost income streams.

In all the circumstances, the government's objections to use of the return-on-equity approach to measuring economic impact are not well received. Those objections in this case contravene the lessons of the temporary takings cases arising with operating properties during World War II, including *Pewee Coal* and *General Motors,* as well as the more recent decisions in *Cienega VIII, Chancellor Manor, Rose Acre Farms, A.A. Profiles, Wheeler*, and *Cienega IX.* Factually also, a return-on-equity method measures what happens during the entire period of the temporary taking, which is the relevant time span, not just at a single point in time. Moreover, it avoids the problem that, for an income-producing, operating property, a change-in-value approach tends to disregard the loss of the full income stream for a substantial period of time. For these reasons, the court determines that the return-on-equity approach provides the most appropriate measure of economic impact in this temporary taking case of an income-producing property.

Dr. Ragas measured the diminution in return on equity to CCA by dividing the maximum HUD-allowed annual dividend, $12,952, by the aggregate equity in the property at the time of prepayment, $811,700. PX 125 (Ragas updated expert report) (June 22, 2006) ("Ragas updated report") at 2, Table Thirty-Three. This methodology followed that employed in *Cienega VIII. See* 331 F.3d at 1342 (using the same approach); *Cienega IX,* 67 Fed. Cl. at 476 (same).[37] Under this measure, CCA received

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[37] Dr. Ragas calculated the equity by adding CCA's cumulative principal repayments from 1976 to 1991, to its HUD-approved equity in 1976. PX 125 at Table Thirty-Three.

a 1.6% return on its real equity. PX 125 at Table Thirty-Three. Comparing this 1.6% return to a conservative 8.5% return on 15-year mortgage-backed securities, the comparative benchmark used in *Cienega VIII,* yields an economic impact of 81.25%. *Id.; see* PX 125 at Table Thirty-Three.

Dr. Ragas's calculation is based on the maximum annual return, *fixed by HUD,* that CCA could have received during the alleged temporary takings period–expressed as a percentage of the aggregate equity CCA had invested in Chateau Cleary at the time for prepayment. *See, e.g.,* PX 125 (Ragas updated expert report) at 2, Table Thirty-Three.

The government challenges Dr. Ragas's calculation of economic impact in two ways. First, the government claims that CCA's failure to pursue a sale of Chateau Cleary under the preservation statutes " eliminates any potential economic impact" to CCA because any adverse impact "resulted from [CCA's] own decision to maintain the *status quo*–not from the challenged regulations." Def.'s Br. at 33-35. This contention rests on the same faulty premise as the government's analogous argument that CCA's claims are not ripe: that to vindicate its right to prepay its mortgage, CCA was obligated to pursue the secondary preservation-option scheme established under the preservation statutes. CCA was under no such obligation, and in any event, any value these extrinsic options had would only be taken into account in determining just compensation. *See supra* at 191 n. 27; *Cienega IX,* 67 Fed. Cl. at 478.

Second, the government avers that CCA's failure

to request regular rent increases undercuts CCA's claim that, in the absence of the preservation statutes, it would have prepaid on schedule in May 1991. Def.'s Br. at 35-36. As the government would have it, because CCA allegedly would not have prepaid its mortgage in 1991, ELIHPA and LIHPRHA could not have caused CCA a severe economic deprivation. *See id.* This criticism disregards the fact that Dr. Ragas computed the *maximum* annual return CCA *could have received* and did not rely on the lesser actual returns that CCA earned. PX 125 (Ragas updated report) at 3, Table Thirty-Three. Moreover, that CCA did not seek rent increases from 1985 to 1994 is of no significance for the separate reason that the regulatory agreements did not mandate that CCA seek rent increases. *See supra,* at 22; PDX 33 (Chateau Cleary Operating Expenses and Rent Increases).[38]

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[38] CCA also had practical reasons for foregoing rent increases. From the mid-1980s until about 1990-1991, New Orleans was in the midst of a severe recession due to the decline of the oil and gas industries, resulting in bank failures and "widespread failures in the apartment marketplace." Tr. 822:7-22 (Test. of Ragas). The recession drove market-rate properties in West Metairie to lower their rents to levels near those at Chateau Cleary, causing CCA to "tighten [its] belt[ ]" and decrease its operating expenses. Tr. 155:18 to 156:12 (Test. of Norman). After receiving a rent increase in 1984, based on 1983 operating expenses, Chateau Cleary's operating expenses increased in 1985 and then decreased for three consecutive years. PDX 33 (Chateau Cleary Operating Expenses and Rent Increases). Operating expenses then increased every year from 1989 to 1992, declined in 1993, and rose again in 1994. PDX 33 (Chateau Cleary Operating Expenses and Rent Increases). CCA points out that not until 1992 did Chateau Cleary's operating expenses exceed in absolute terms the 1985 levels. Pl.'s Br. at

The government also observes that after HOPE was enacted, CCA could have moved more expeditiously than it did to prepay its mortgage. Def.'s Br. at 36. CCA prepaid on September 30, 1998, well after the issuance of Preservation Letter No. 97-1, under which HUD halted its efforts to forestall post-HOPE prepayment. Pl.'s Br. at 22; PX 75 (Preservation Letter No. 97-1), Attach. at 7. This delay, however, has no effect on the economic impact of the alleged taking because CCA claims the takings period ended no later than February 28, 1997. *See* Pl.'s Br. at 60.

Based upon the evidence adduced, the court concludes that the methodology Dr. Ragas employed for calculating economic impact was reasonable and that the calculations he performed were accurate. The court accepts Dr. Ragas's estimate of an 81.25% diminution in value and concludes that this economic impact is a "serious financial loss" caused by ELIHPA and LIHPRHA. *See Cienega VIII,* 331 F.3d at 1343; *see also Cienega IX,* 67 Fed. Cl. at 477.

d. *Takings synopsis.*

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31. (The proofs at trial showed that HUD would approve rent increases generally on the basis that the property's operating expenses had increased. Tr. 155:18 to 156:25) (Test. of Norman). The government notes that CCA's operating expenses from 1985 to 1994 were higher in absolute terms than the 1983 levels. Def.'s Br. at 16. These arguments are beside the point. Even if HUD would have approved of rent increases for a property serving economically disadvantaged tenants during a recession, raising rent would not have been feasible for CCA. *See* Tr. 156:1-12 (Test. of Norman). Most importantly, Dr. Ragas's comparative use of *maximum* allowable returns on CCA's equity eliminates this consideration in all events.

Having examined the three *Penn Central* factors and weighed all of the relevant circumstances, *see Tahoe-Sierra,* 535 U.S. at 322, 122 S.Ct. 1465, the court concludes that ELIHPA and LIHPRHA effected a temporary taking of CCA's property. The preservation statutes have the character of a taking in that they disproportionately placed the burden of providing low-income housing on owners of Section 221(d)(3) properties, such as CCA. ELIHPA and LIHPRHA also frustrated the reasonable investment-backed expectations of the Norman brothers and, later, CCA. The prepayment right was the *sine qua non* of the deal the Norman brothers struck with HUD and the original developers. The Norman brothers purposely invested in a property located in an area, West Metairie, that possessed qualities ideal for eventual conversion of the property into a market-rate apartment complex, and they built a complex that would be an appropriate participant in a conventional rental housing market. Likewise, the expectation that the government would honor its commitment to allow CCA to prepay and exit the HUD program after twenty years was reasonable. CCA suffered a severe economic deprivation, losing more than eighty percent of the returns that a conservative financial investment would have earned during the takings period. Having shown through evidence that each of the three *Penn Central* factors has been satisfied, CCA has proven that it suffered a temporary regulatory taking.

e. *Duration of the temporary taking.*

The Norman brothers signed their second mortgage and the secured note on Chateau Cleary on May 17, 1971. PX 5 (1971 note); PX 6 (1971

mortgage), meaning that on May 17, 1991, CCA was eligible to prepay in the absence of the preservation statutes. The only dispute between the parties is the date upon which the taking ended. CCA advocates an end-of-taking date of February 28, 1997, Pl.'s Br. at 60, while the government argues that the taking ended on May 31, 1996, slightly over sixty days after the passage of HOPE. Def.'s Reply at 36.

HOPE reinstated the prepayment rights of owners whose mortgages were insured under Section 221(d)(3), § 2(b), 110 Stat. at 834-35, but the preservation letters, *see supra* at 12, were purposely intended to deter or delay prepayment of Section 221(d)(3) mortgages. *See* Tr. 1090:12 to 1091:1 (Test. of Kizzier). Mr. Norman also testified that the preservation letters–in part because of their ever-shifting standards–created significant uncertainty, leading CCA to delay its plans for prepayment. Tr. 234:17 to 235:3 (Test. of Norman). Preservation Letter 97-1, issued on December 16, 1996, finally ended that uncertainty. PX 75 (Preservation Letter No. 97-1), Attach. at 7. As noted earlier, CCA did not actually prepay until September 30, 1998. Pl.'s Br. at 22. In these circumstances, the court finds that following Preservation Letter 97-1, CCA reasonably could have prepaid by December 31, 1996. Factoring in HOPE's 60-day moratorium on rent increases, the court accepts CCA's end-of-taking date of February 28, 1997. *Cf. Cienega IX*, 67 Fed. Cl. at 481 (end-of-taking date of March 1, 1997 for plaintiffs in somewhat analogous situation).

3. *Just compensation.*

Just compensation "means the full and perfect equivalent in money of the property taken. The

owner is to be put in as good [a] position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller,* 317 U.S. 369, 373, 63 S.Ct. 276, 87 L.Ed. 336 (1943); *see also Monongahela Navigation Co. v. United States,* 148 U.S. 312, 326, 13 S.Ct. 622, 37 L.Ed. 463 (1893) (there is "no doubt that the compensation must be a full and perfect equivalent for the property taken."); *Narramore v. United States,* 960 F.2d 1048, 1051 (Fed. Cir. 1992) ("The Fifth Amendment guarantees a property owner the right to seek damages for the full extent of a taking."). The proper measure of damages for a temporary taking of a going business concern can be the difference between the fair market rent the owner could have earned, but for the taking, and the rent, if any, the owner earned during the takings period. *See Kimball Laundry,* 338 U.S. at 7, 69 S.Ct. 1434 ("the proper measure of compensation is the rental that probably could have been obtained [but for the taking]."); *Petty Motor,* 327 U.S. at 381, 66 S.Ct. 596 (just compensation measured by "the difference between the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew ... less the agreed rent which the tenant would pay for such use and occupancy."); *see also Powee Coal,* 341 U.S. at 117, 71 S.Ct. 670 ("Ordinarily, fair compensation for a temporary possession of a business enterprise is the reasonable value of the property's use," but the better measure on the facts was the operating losses suffered during the temporary period of governmental control.); *United States v. Commodities Trading Corp.,* 339 U.S. 121, 123, 70 S.Ct. 547, 94 L.Ed. 707 (1950) ("This Court has never attempted to prescribe a rigid rule for

determining what is 'just compensation' under all circumstances and in all cases.").

a. *Net rental value.*

CCA's model of damages, developed by Dr. Ragas, measures "the difference between the cash flow CCA would have received had it been allowed to prepay its mortgage and operate the property as a conventional apartment complex ('the [m]arket [s]cenario') and the cash flow CCA actually received from operating the property as a HUD-restricted property (the 'HUD [s]cenario')." Pl.'s Br. at 26. Dr. Ragas first determined under the market scenario the gross income, operating expenses, and financing costs for CCA. PDX 17 (Damages Calculation Methodology); *see also* Tr. 815:16 to 817:14 (Test. of Ragas); *see generally* PX 106 (second Ragas report). To calculate gross income, Dr. Ragas used *The New Orleans and South Central Gulf Real Estate Market Analysis,* a survey done under the auspices of the University of New Orleans ("UNO"), that Dr. Ragas had conducted at least once every year since 1978. PX 106 (second Ragas report) at 20, 23.[39] The UNO survey reported apartment rents in the New Orleans area by unit type and geographic submarket, enabling Dr. Ragas to derive market rents and occupancy levels based on properties comparable to Chateau Cleary and located in the same submarket. *See id.* at 20, 22-23. Dr. Ragas concluded, based on the property's construction, amenities, and unit sizes, that Chateau Cleary was an average quality

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[39] For approximately thirty years, Dr. Ragas conducted the survey while serving as a professor and the director of a real estate research center at UNO. Tr. 743:1-7 (Test. of Ragas).

apartment complex in the West Metairie submarket. Tr. 1927:12 to 1928:3, 1930:25 to 1933:8 (Test. of Ragas).[40] In a similar fashion, Dr. Ragas estimated Chateau Cleary's operating expenses based on Chateau Cleary's experience and that of comparable properties, also incorporating the initial costs for converting the property to a market-rate complex. PX 106 (second Ragas report) at 19, 26-30, 35; Tr. 837:4-8 (Test. of Ragas). Financing costs were based on market interest rates. PX 106 (second Ragas report) at 31-32. From these figures, Dr. Ragas derived CCA's estimated net cash flows under the market scenario. *See* Tr. 817:6-14 (Test. of Ragas); PDX 17 (Damages Calculation Methodology).

Second, Dr. Ragas calculated for each year of the takings period the difference between the market-rate net cash flows and the net cash flows CCA actually received during the temporary takings period under the HUD restrictions. *See* PDX 17 (Damages Calculation Methodology); PDX 30 (Damages Totals, June 1991-February 1997, Scenario 2) ("Damages Totals").[41] Third, Dr. Ragas

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[40] Based on a survey of apartments in the West Metairie submarket, Dr. Ragas found that Chateau Cleary's 22 one-bedroom, one-bath units and its 22 two-bedroom, one-bath units were slightly larger than average. Chateau Cleary's 44 two-bedroom, one-and-a-half-bath townhouses were smaller than average, but in high demand because of the increased privacy they offered due to their design. The complex's 16 three-bedroom, two-bath units were also smaller than average, but were in short supply in the area and thus in high demand. Tr. 1930:25 to 1933:8 (Test. of Ragas); PX 106 (second Ragas report) at 40.

[41] Dr. Ragas calculated lost rents for the following seven time periods: June 1991 to December 1991 (-$20,293); 1992

then applied a ten percent discount rate to those unadjusted net amounts to determine the present value of the lost rents at the end of the taking, February 28, 1997. PX 125 (Ragas updated report) at Table Thirty-Two; PDX 31 (Adjustment of Damages-Scenario 2). Applying a ten-year Treasury STRIPS rate of 6.4 percent from the end of the taking to an estimated judgment date of September 30, 2006, Dr. Ragas arrived at a final damages calculation of $1,528,629. PX 125 (Ragas updated report) at Table Thirty-Two; PDX 32 (Calculation of Interest-Scenario 2 (Feb. 28, 1997 takings period end date)). The court finds that Dr. Ragas's methodology is reliable and provides a sound basis for determining damages.[42]

The government contests Dr. Ragas's calculation of just compensation on several grounds. First, the government argues that CCA is owed no compensation because "CCA was free to exit the

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($136,497); 1993 ($134,744); 1994 ($164,987); 1995 ($148,151); 1996 ($104,810), and January 1997 through February 1997 ($17,467). PDX 30 (Damages Totals). The sum of these unadjusted damage totals is $686,363.

[42] The soundness of Dr. Ragas's methodology can be seen by a comparison of comparable lost-rent estimates performed by Dr. Ragas and the government's expert, Mr. Derbes. Dr. Ragas calculated unadjusted net rental income from May 1991 to May 30, 1996 as $607,757. PDX 28 (Adjustment of Damages-Scenario 1). Mr Derbes calculated CCA's "loss of income" from May 1991 to April 30, 1996 as $526,971, only $80,786 less than Dr. Ragas's estimate. DX 173 (Derbes Supplemental Report) (April 29, 2005) at 13; Tr. 1523:16 to 1525:23 (Test. of Derbes). The similarity in the two estimates provides a useful sensitivity test and reinforces the court's decision to accept Dr. Ragas's methodology as reliable.

[original HUD] program" in the limited sense that it could invoke options under the preservation statutes to sell or seek incentives. *See* Def.'s Reply at 30-31. The court has rejected this contention in the context of other issues addressed in this opinion, but the argument cannot be rejected summarily when addressing just compensation because the value of any options that were exercised properly relates to just compensation. *See supra,* at 191 n. 27. The government in effect contends that CCA is owed no compensation because of the mere existence of the options, even though CCA did not exercise any of them. Def.'s Reply at 30-31. The shortest answer to the government's contention is that CCA had no obligation to seek incentives or sale options it manifestly did not want. *See* Tr. 198:21 to 200:7, 207:12 to 208:25 (Test. of Norman.). By filing a notice of intent, CCA kept open the possibility that at a later time it might choose to seek a sale or a use agreement under the preservation statutes, but at least during the temporary takings period when the prepayment bar of the preservation statutes remained in effect, any action it would have undertaken to pursue those options would not have been a voluntary choice. *See Independence Park IV,* 465 F.3d at 1311-12; *Cienega IX,* 67 Fed. Cl. at 482. After HOPE was enacted, CCA had no reason to pursue those options because prepayment was near at hand. Moreover, the options were not attractive to CCA. A use agreement would have locked Chateau Cleary into the HUD program for a long period. And, despite LIHPRHA's language calling for determining the "fair market value" of a sale, 12 U.S.C. § 4103(b)(2), the testimony at trial established that the preservation statutes provided no guarantees of

the owner receiving fair market value. *See supra,* at 190 n. 26.

Second, the government argues that Dr. Ragas inappropriately used an *ex post* analytical approach, by "calculat[ing] compensation at the end of the alleged takings," rather than at the start of that period. *See* Def.'s Reply at 31. In support of this argument, the government cites cases that conclude that *where a permanent taking occurs,* just compensation must be measured "as of the time of the taking." Def.'s Br. at 52. The government takes this to mean that *in all temporary taking cases* the time of the taking is the point in time at which the taking begins. However, in the case of a temporary taking, such as this one, the "time of the taking" is the *full* period during which the governmental action constrained the owner's property rights, not just the start of that period. Therefore, the valuation date for temporary takings is appropriately designated as the end of the takings period because "the end of the temporary taking sets a boundary for just compensation and, apart from duration, events that transpired during the temporary takings period 'have to be taken into account in setting a valuation.'" *Cienega IX,* 67 Fed. Cl. at 490 (quoting *Independence Park I,* 61 Fed. Cl. at 709). The Federal Circuit implicitly approved of this methodology when it ruled on appeal in *Independence Park III* that an owner who signed a use agreement during the takings period was entitled to just compensation for the term of the use agreement. *See* 449 F.3d at 1248 ("[T]he calculation of damages should be adjusted in the case of [owners who signed use agreements] to treat the ban on prepayment as lasting as long as the use agreements

provided for, with the amount of damages adjusted to account for any benefits [those owners] obtained as a result of the use agreements."); *see also Independence Park IV,* 465 F.3d at 1312 (same on reconsideration).[43]

Third, the government argues that CCA is a below-average property, not an average property, as Dr. Ragas concluded. Def.'s Br. at 57-58. The government relies, in part, on the fact that after prepayment in 1998, CCA did not charge the average rents for the West Metairie submarket. *Id.* However, the apartment rental market changed substantially from 1991 to 1998. New complexes with better

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[43] In an argument related to the government's critique of Dr. Ragas's so-called *ex post* approach taking into account the end of the taking, the government avers that the court should use the *ex ante* approach advocated by its expert, Dr. Dickey. Def.'s Br. at 55. However, while initially purporting to be an *ex ante* analysis, Dr. Dickey's damages calculation incorporated a valuation performed by Mr. Derbes that *assumed* that an owner, as of May 1, 1991, knew with certainty that HOPE would be enacted in 1996. DX 160 (Dickey report) at 4; Tr. 1723:3-23, 1725:21-24 (Test. of Dickey). Dr. Robert Stillman, CCA's economics expert, criticized Dr. Dickey's methodology by arguing that a proper *ex ante* analysis should be based only on the facts and circumstances known at the time of the start of the taking (*i.e.,* May 1991). Tr. 1852:11 to 1853:14 (Test. of Stillman). From a perspective as of May 1991, Dr. Dickey should not have "peek[ed]" at the so-called *ex post* fact of HOPE's enactment. *See* Tr. 1861:14 to 1862:24 (Test. of Stillman). When the government's counsel asked Dr. Stillman whether Dr. Dickey's assumption about HOPE was the "*only ex post* information" that he had incorporated into his analysis, Dr. Stillman responded: "[Y]es, that's the only–'how was the play, Mrs. Lincoln,' but yes." Tr. 1870:2-9 (Test. of Stillman) (emphasis added).

amenities were coming on the market in areas just south of West Metairie beginning in 1996, shifting the average upward. Tr. 824:3 to 825:13, 829:2 to 830:20, 1063:13 to 1065:18, 1942:2-9, 1991:2-9 (Test. of Ragas). Noting that these new complexes were not built in West Metairie itself, the government disputes the effect they could have on CCA's rents. Def.'s Reply at 34.[44] Mr. Derbes, the government's expert, opined that the newer complexes had not affected CCA's rents because CCA served a different class of tenants, Tr. 1429:11 to 1432:2 (Test. of Derbes), while Dr. Ragas believed that the newer projects had affected CCA. Tr. 1063:13 to 1065:18, 1942:2-9, 1991:2-9 (Test. of Ragas). Indeed, Dr. Ragas testified that the entry of the newer complexes immediately south of West Metairie had a significant impact on the *overall* New Orleans market–leading him to begin to publish one annual rental survey for these higher-quality apartments and one for the rest of the market "because the rest of the market was lagging in not [experiencing] nearly the gains that the new[er] ... units were achieving." Tr. 1063:6 to 1065:7 (Test. of Ragas). The court credits Mr. Ragas's testimony, given his greater detailed knowledge of the rental housing market throughout the New Orleans area.

Dr. Ragas also criticized Mr. Derbes's conclusion that Chateau Cleary was a below-average property.

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[44] The government objects to another minor aspect of Dr. Ragas's damages calculations-an error he made as to the square footage of the three-bedroom units at Chateau Cleary, leading to a difference of "$1,000 a year out of some $350,000 in rent." Def.'s Br. at 58-59; Tr. 1985:5-21 (Test. of Ragas). This error is insignificant, and the court will disregard it.

See Tr. 1927:8 to 1928:4 (Test. of Ragas); *see also* Tr. 1424:6 to 1429:10 (Test. of Derbes). He faulted Mr. Derbes for using his own *forecasts* of market rents based on comparable properties given that *actual* data on market rents was available from the annual UNO survey. PX 119 (Ragas rebuttal report) (May 30, 2005) at 10. Dr. Ragas also pointed out that Mr. Derbes had characterized the comparable properties he used in his analysis as being in average to good condition and yet characterized Chateau Cleary as below-average. *See id.* at 4. Finally, Dr. Ragas noted that in estimating per-unit sales prices, Mr. Derbes assigned Chateau Cleary a higher market value per unit than the average comparable per-unit sales price. *Id.* Based upon these factors, the court adopts Dr. Ragas's testimony that Chateau Cleary was at least an average property in the relevant market. First, Mr. Derbes' own sales estimates support the fact that Chateau Cleary should be valued as a better-than-average property. Second, the site visit showed Chateau Cleary's quality construction, good overall average room size, the value of having three-bedroom units, which were in short supply, and ideal location. *See also* Tr. 1927:12 to 1928:3, 1930:25 to 1933:8 (Test. of Ragas). Lastly, Dr. Ragas had long-standing expertise in this area and the breadth of the survey data he used based on *actual* market rents charged in the West Metairie submarket during the takings period supported his observations over those of Mr. Derbes. Chateau Cleary was an average property.[45]

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[45] The government also objects to Dr. Ragas's use of the rents CCA actually charged for the actual HUD-restricted case during the years from 1991 to early 1995 because CCA failed to

b. *Discounting.*

To put an owner of a going business concern in as good a position as it would have been in if its property had not been taken, *see Miller,* 317 U.S. at 373, 63 S.Ct. 276, a court must apply a discount rate to the foregone stream of net rents. *See Whitney Benefits, Inc. v. United States,* 18 Cl. Ct. 394, 412-13 (1989), *aff'd,*926 F.2d 1169, 1178 (Fed. Cir. 1991). "[T]he discount rate performs two functions: (i) it accounts for the time value of money; and (ii) it adjusts the value of the cash flow stream to account for risk." *Energy Capital Corp. v. United States,* 302 F.3d 1314, 1333 (Fed. Cir. 2002). The discount rate "reflects returns required to attract investment capital" and incorporates a risk premium "to account for the potential investor's uncertainty about future events." *Cienega IX,* 67 Fed. Cl. at 490. For temporary takings, the valuation date is the end of the takings period, giving full consideration to events that transpired during the takings period, including the finite end to that period. *See Seiber,* 364 F.3d at 1364; *see also Cienega IX,* 67 Fed. Cl. at 490.[46]

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seek rent increases. Def.'s Br. at 56-57. For the reasons cited *supra,* at 198 & n. 38, this argument is rejected.

[46] The government again argues that the proper valuation date is "the time of the taking," but it means only the beginning of the takings period, not also the time to the end. *See* Def.'s Br. at 54-55 & n. 12; *see also* Def.'s Reply at 31. In this connection the government contends that CCA's damages should be adjusted *downward* by the discount rate using the finite starting time as a measuring point. Among other things, the government avers that the market-rate rents that CCA could have charged in the absence of the preservation statutes

Dr. Ragas applied a ten percent discount rate at the end of the takings period, February 28, 1997. PX 125 (Ragas updated report) at Table Thirty-Two; PDX 31 (Adjustment of Damages-Scenario 2). The ten percent rate reflected a slight premium over the relatively riskless rate of 8.5 percent to account for the "opportunity cost" CCA lost due to the preservation statutes. *See* Tr. 863:2-10 (Test. of Ragas). Mr. Norman testified that had CCA received the extra cash flows that market rents would have brought, it would have invested them with the goal of a fifteen to twenty percent annual return. Tr. 291:25 to 292:9 (Test. of Norman). Dr. Ragas believed that a discount rate based on these alternative investments was too high, but that a rate that reflected some risk, such as that found in utility bonds, corporate bonds, or real estate investments in comparable properties in the Jefferson Parish submarket, was appropriate. Tr. 863:2 to 864:14 (describing ten percent discount rate for a nominal takings period that ended in May 1996), 867:1 to 869:19 (indicating use of an identical approach for the takings period ending in February 1997) (Test. of Ragas); PX 106 (second Ragas report) at 45, 51. Based on these considerations, Dr. Ragas arrived at a ten percent discount rate. *See* Tr. 863:2-10 (Test. of Ragas).

Relying on the testimony of the government's and CCA's economics experts, Tr. 1687:6-12, 1688:1-13

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consist of inappropriate *ex post* information. This argument is unavailing because "the time of the [temporary] taking" is *not* a single point in time, but rather the entire time period. *See supra*, at 197, 201.

(Test. of Dickey), 1867:4-13, 1869:9-20 (Test. of Stillman), the government argues that a single, risk-free rate interest rate should be used to bring cash flows forward, not only to the date the taking ended or to the date the judgment is entered, but to the date the judgment is paid. *See* Def.'s Br. at 59; Def.'s Reply at 40. Specifically, the government contends that the defendant's debt rate should be used because an owner's claim at the time of the taking is against the government, and such a claim bears no risk. Def.'s Br. at 59; Tr. 1687:6-12, 1688:1-13 (Test. of Dickey).[47] The government's approach, however, does not adequately "adjust [ ] the value of [CCA's lost] cash flow stream to account for risk." *See Energy Capital,* 302 F.3d at 1333. Therefore, the court accepts Dr. Ragas's proffered ten percent discount rate.

Applying a ten percent discount rate to the year-by-year lost rents for CCA, to the end of the

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[47] The government also asserts that the discount rate for rents earned as a conventional property should be higher than those earned while under HUD restrictions. Def.'s Br. at 59 n. 14; *see also* DX 160 (Dickey report) at 34, 37. The government discounts Chateau Cleary's quality of construction, the value of its three-bedroom units, which were in short supply, and its ideal location, as well as testimony at trial of the "scores" of defaults of HUD-restricted properties in the New Orleans area during the recession from the late 1980s through the early 1990s. Tr. 1927:8 to 1928:4, 1930:25 to 1933:8 (Test. of Ragas), 502:22-25 (Test. of Alexander); DX 140 (Alexander report) at 80 ("scores of other projects defaulted, went into bankruptcy, and were eventually foreclosed."); *cf. Cienega IX,* 67 Fed. Cl. at 491. Dr. Ragas's estimate that the risk rates under either the market scenario or the HUD scenario would be roughly the same is accepted.

temporary takings period, yields the following values:

time period	lost rents	value as of Feb. 28, 1997
6/91-12/91	($ 20,293)	($ 33,102)
1992	136,497	202,412
1993	134,744	181,648
1994	164,987	202,198
1995	148,151	165,059
1996	104,810	106,156
1/97-2/97	17,467	17,467
		$841,839

See PX 125, Table Thirty-Two. Accordingly, the just compensation due CCA as of February 28, 1997, not including interest, is $841,839.

c. *Interest.*

"If the Government pays the owner before or at the time the property is taken, no interest is due on the award ... [b]ut if disbursement of the award is delayed, the owner is entitled to interest thereon." *Kirby Forest Indus., Inc. v. United States,* 467 U.S. 1, 10, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984) (internal citation omitted). If the government does not pay compensation at the time of the taking, the Takings Clause requires a payment of interest. *Seaboard Air Line Ry. v. United States,* 261 U.S. 299, 306, 43

S.Ct. 354, 67 L.Ed. 664 (1923); *see also Library of Congress v. Shaw,* 478 U.S. 310, 317 n. 5, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986) *superseded on other grounds by statute,* Civil Rights Act of 1991, Pub.L. No. 102-66, 105 Stat. 1071; *Cienega IX,* 67 Fed. Cl. at 492. Because the government did not compensate CCA at the time of the taking, CCA is owed interest on the present value of the damages CCA suffered from and after February 28, 1997, the end of the temporary taking.

Dr. Ragas applied a compound interest rate of 6.4 percent, the ten-year Treasury STRIPS rate, from the end of the taking, February 28, 1997, to an estimated judgment date of September 30, 2006. PX 125 (Ragas updated report) at Table Thirty-Two (referring to a 6.4 percent rate); PDX 32 (Calculation of Interest-Scenario 2 (Feb. 28, 1997 takings period end date)) (same); *see also* Tr. 865:21 to 866:14, 868:23 to 869:1 (Test. of Ragas). The government argues that the single riskless interest rate it advocates should be applied using simple, not compound interest, but, in the alternative, concurs that the ten-year STRIPS rate is appropriate. *See* Def.'s Br. at 59; Def.'s Reply at 39-40.

(i.) *Interest rate.*

The determination of an appropriate interest rate is based on the so-called "prudent investor rule," which measures "how 'a reasonably prudent person' would have invested the funds to 'produce a reasonable return while maintaining safety of principal.'" *Tulare Lake Basin Water Storage Dist. v. United States,* 61 Fed. Cl. 624, 627 (2004) (quoting *United States v. 429.59 Acres of Land,* 612 F.2d 459, 464-65 (9th Cir. 1980)). In *Cienega IX,* this court,

under similar circumstances, applied the ten-year STRIPS rate for three key reasons: (1) Treasury STRIPS reflect the minimal risk that the United States government will default on its obligations, (2) in that case, the ten-year STRIPS rate roughly approximated the length of time from the end of the taking to the date of judgment, and (3) the court has a strong judicial policy in favor of uniform interest rates for similarly situated plaintiffs. *Cienega IX,* 67 Fed. Cl. at 493; *Georgia-Pacific Corp. v. United States,* 226 Ct. Cl. 95, 640 F.2d 328, 365-66 (1980) (favoring uniform interest rates); *Tulare Lake,* 61 Fed. Cl. at 627 (same); *Independence Park I,* 61 Fed. Cl. at 716-17 (applying ten-year STRIPS rate). These reasons are equally applicable to CCA's case; here also, approximately ten years have passed since the end of the takings period. Therefore, the interest rate represented by ten-year STRIPS is appropriate.

(ii.) *Compounding.*

Dr. Ragas's damages model employed compound interest, but the government claims that simple interest would provide adequate compensation to CCA because CCA allegedly bore no risk and its damages model "more than captures the full investment opportunity at the time of the alleged taking." Def.'s Reply at 38. A first principle of Takings Clause jurisprudence is that the just compensation should put CCA in as good a position as if its property had never been taken. *See Miller,* 317 U.S. at 373, 63 S.Ct. 276; *Monongahela Navigation,* 148 U.S. at 326, 13 S.Ct. 622; *Narramore,* 960 F.2d at 1051. The Federal Circuit has said that in some cases compound interest may be necessary "'to accomplish complete justice'" under the Takings Clause. *Dynamics Corp. of Am. v.*

United States, 766 F.2d 518, 520 (Fed. Cir. 1985) (quoting *Waite v. United States,* 282 U.S. 508, 509, 51 S.Ct. 227, 75 L.Ed. 494 (1931)).

In this case, compounding is necessary to satisfy the mandate of the Takings Clause. "Income-producing property would generate an income stream that would be available for continual investment, at compound rates. Just compensation requires the payment of compound interest to replace the investment opportunities plaintiffs lost when the government took their property." *Whitney Benefits, Inc. v. United States,* 30 Fed. Cl. 411, 415-16 (1994); *see also Vaizburd v. United States,* 67 Fed. Cl. 499, 504 (2005) ("Compounding we view as a routine means by which a reasonable person would protect [himself or herself], over an extended period of time, from erosion of [his or her] investment."). Had the government properly compensated CCA in February 1997, CCA would have reinvested that money. The lengthy passage of time since the end of the taking also is a pertinent factor in this determination. *See Whitney Benefits,* 30 Fed. Cl. at 415 ("[B]ecause of the long delay since the date of taking in this case, the award of compound interest is not only proper, but its denial would effectively undercut the protections of the fifth amendment to our Constitution."). In light of these facts, compound interest is an appropriate and just means of compensating CCA. *See Cienega IX,* 67 Fed. Cl. at 493.

CONCLUSION

For the reasons stated, the court finds that CCA has suffered a temporary taking for which just compensation is due. The amount of just

compensation awarded CCA is $841,839 as of the end of the temporary takings period, February 28, 1997, plus compound interest at the ten-year STRIPS rate from that date to the date the judgment is actually paid.

Final judgment to this effect shall be issued under RCFC 54(b) because there is no just reason for delay. In due course, the court will also award costs to plaintiffs, including an award of attorneys' fees and expenses under Section 304(c) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4654(c). Given the high likelihood of appeal in this case and in the interest of efficiency, proceedings on award of attorneys' fees and costs should be deferred until after any appellate process has been concluded.

The clerk shall enter final judgment as specified above.

It is so ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CIENEGA GARDENS, Del Amo Gardens, Las Lomas Gardens, Blossom Hill Apartments, and Skyline View Gardens, Plaintiffs-Appellees,

v.

UNITED STATES, Defendant-Appellant.

CHANCELLOR MANOR, Gateway Investors, Ltd., and Oak Grove Towers Associates, Plaintiffs-Appellees,

v.

UNITED STATES, Defendant-Appellant.

Nos. 2006-5051, 2006-5052.

Sept. 25, 2007.

503 F.3d 1266

Before MICHEL, Chief Judge, NEWMAN, Circuit Judge, ARCHER, Senior Circuit Judge, SCHALL, GAJARSA, LINN, and DYK, Circuit Judges.

DYK, Circuit Judge.

These cases involve takings claims resulting from the enactment of the Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-

242, § 202, 101 Stat. 1877 (1988) ("ELIHPA"), and the Low-Income Housing Preservation and Resident Homeownership Act of 1990, Pub. L. No. 101-625, 104 Stat. 4249 (1990) ("LIHPRHA"). The Court of Federal Claims held that the enactment of these statutes effected a taking. *Cienega Gardens v. United States,* 67 Fed.Cl. 434 (2005) ("*Cienega IX*"). Because we conclude that the Court of Federal Claims, notwithstanding its careful opinion, erred in certain respects in its legal analysis, we vacate and remand for further proceedings.

BACKGROUND

These consolidated cases return to us after remands in *Cienega Gardens v. United States,* 331 F.3d 1319, 1324 (Fed.Cir.2003) ("*Cienega VIII*") and *Chancellor Manor v. United States,* 331 F.3d 891, 893 (Fed.Cir.2003). The pertinent history may be briefly described.

I

In 1934 Congress, concerned with the declining national stock of affordable housing, enacted the National Housing Act.[1] Pub.L. No. 73-479, § 1, 48 Stat. 1246 (1934). Until the 1960s, the National Housing Act primarily subsidized the projects of local public housing authorities. In 1961 Congress amended the National Housing Act to "enable private enterprise to participate to the maximum extent in meeting the housing needs of moderate-income families." S.Rep. No. 87-281, at 4 (1961), *as*

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[1] The National Housing Act established the Federal Housing Administration (FHA). In 1965 the Federal Housing Administration was subsumed into the then newly established Department of Housing and Urban Development. *See* 24 C.F.R. §§ 200.1, 200.2 (1994).

reprinted in 1961 U.S.C.C.A.N.1923, 1926; *see* Pub.L. No. 87-70, § 101(a)(6), 75 Stat. 149, 149-50 (1961) ("section 221(d)(3)"). Congress amended section 221(d)(3) in 1968 ("section 236"). Pub.L. No. 90-448, § 201, 82 Stat. 476, 498-501 (1968). The newly enacted section 221(d)(3) and section 236 programs provided financial incentives to private investors for the creation of additional low income housing. These financial incentives were threefold.

First, the programs provided below-market-rate mortgages. Under section 221(d)(3), the owners of low-income housing projects entered into mortgage contracts with private lenders at the market rate. Once the project was completed, the mortgages were purchased by the Federal National Mortgage Association ("FNMA"). The FNMA, using government subsidies, then reduced the original rate, charging below-market rates to the owners. *See* Pub.L. No. 87-70, § 101(c), 75 Stat. 149, 153 (1961). Under section 236, the owners also contracted for mortgages with private lenders, but the government directly subsidized the interest payments to the lender. *See* Pub.L. No. 90-448, § 201, 82 Stat. 476, 498-501 (1968). The programs permitted the owners to borrow ninety percent of the overall cost of the project. The mortgage contracts were for forty-year mortgages and included an option to prepay the mortgage without HUD approval after twenty years. The regulations under the statute were consistent with these contracts, including providing for prepayment without HUD approval after twenty years. 24 C.F.R. §§ 221.524, 236.30 (1970); *see Cienega Gardens v. United States*, 194 F.3d 1231, 1243-44 (Fed.Cir.1998) ("*Cienega IV*").

Second, to encourage lending both sections 221(d)(3) and 236 authorized the FHA to insure mortgages in order to protect lenders against default. *See* Pub.L. No. 90-448, § 201, 82 Stat. 476, 498-501 (1968); Pub.L. No. 87-70, § 103, 75 Stat. 149, 158 (1961).

Finally, the owners were entitled to a "Builder's and Sponsor's Profit and Risk Allowance" ("BSPRA"), which was a payment from HUD to the owner toward the owner's down payment. The BSPRA was calculated as ten percent of the "actual cost" of construction.

In addition to the direct incentives provided under sections 221(d)(3) and 236, entities who entered into these programs received substantial tax benefits. At that time, the tax laws permitted accelerated depreciation for real estate projects over the real economic life of the property, allowing the general and limited partners to take large income tax deductions in the earlier years of the investment. While these tax benefits were not particular to section 221(d)(3) and section 236 properties, the benefits were particularly significant under these programs because the properties were highly leveraged so that the tax benefits the partners received were substantial in comparison to their limited investment.

To ensure that the housing created by the programs would continue to be used for low-income families, Congress provided that the Department of Housing and Urban Development ("HUD") would regulate the operation of the low-income housing projects. Under both programs, the owner and HUD entered into a regulatory agreement where any important management decisions, including

increases in rents, had to be approved by HUD. *See* Pub.L. No. 90-448, § 201, 82 Stat. 476, 498-501 (1968). The agreements, under which HUD provided mortgage insurance and various subsidy payments, restricted the owners' annual return to six percent of their initial equity investment in the property. This six percent dividend was not limited to the owners' *net cash investment* in the property, which was only 1.8 to 3 percent of the value of the property, but was six percent of the *initial equity investment. See Cienega IX,* 67 Fed.Cl. at 440. The initial equity investment included the government's BSPRA contribution, and the equity was not reduced by the tax benefits received. *Id.* Accordingly, the six percent dividend on the initial equity in the property (the cash investment and the BSPRA), could represent as much as a twenty-five percent return on the owner's actual net cash investment.

The restrictions of the regulatory agreements were effective for as long as HUD insured the mortgage on the property, *i.e.,* until the mortgage was paid off. The exercise of the prepayment right under the mortgage agreement with the mortgage lender would thus have the effect of terminating the regulatory agreement. For example, the Chancellor Manor regulatory agreement stated that "[i]n consideration of the endorsement for insurance ... Owners agree [to the restrictions set forth in the agreement] ... so long as the contract of mortgage insurance continues in effect ... or during any time the Commissioner is obligated to insure a mortgage on the mortgaged property." Chancellor Manor J.A. 500165. As discussed below, there is a question whether prepayment rights, as opposed to the other

benefits of the transactions, played a significant role in the owners' decision to invest in the property.

The owners of these projects were typically limited partnerships. This allowed the owners to "pass through" the entity's tax losses primarily to the limited partners. Along with the general partners, the limited partners also received a pro rata share of the annual six percent dividend. The plaintiffs here consist of eight partnerships: Cienega Gardens, Del Amo Gardens, Las Lomas Gardens, Blossom Hill Apartments, Skyline View Gardens, Chancellor Manor, Oak Grove Towers Associates, and Gateway Investors, Ltd. The prepayment restrictions on their mortgages were set to expire between July 15, 1991, and June 6, 1995.

II

In the 1980s, Congress became concerned that as prepayment dates arrived the limited partnerships would prepay the mortgages; that the restrictions imposed during the mortgage period would expire; and that the housing stock represented by these projects would be withdrawn from the low-income market and converted to traditional apartment units, rented at market rates. Congress reacted with a carrot-and-stick approach, first enacting ELIHPA in 1988 (a temporary measure), and then superseding this statute by LIHPRHA in 1990 (initially planned as a permanent measure). In enacting these statutes, Congress sought to "balance the public policy need to preserve housing for low income families with the perceived contractual rights of the owners." H.R.Rep. No. 101-559, at 75 (1990).

LIHPRHA was enacted on November 28, 1990,

and is the most pertinent legislation. Under LIHPRHA, Congress restricted the rights of owners by requiring them as a condition of exiting the program to offer their property for sale to owners that would preserve the rent restrictions and barring the owners from exiting the programs (by effectively barring prepayment of the mortgages) while the properties were offered for sale. *See* 12 U.S.C. § 4110 (2000).[2] For a fifteen-month period, the owners were required to sell the property at the "the fair market value of the housing based on the highest and best use of the property" to particular organizations that would agree to preserve the rent restrictions. *Id.* §§ 4103(b)(2), 4110. After the fifteen month offer period, if there had been no sale, the owners were permitted to prepay the mortgages. *Id.* § 4114(a)(2). If HUD approved the sale, HUD provided the purchaser with financial assistance. *Id.* § 4110(d)(3). If HUD failed to provide assistance to

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[2] LIHPRHA provided that owners could immediately prepay (without offering the properties for sale) with HUD approval. However, HUD was only permitted to approve immediate prepayment upon finding that the effect of prepayment would not "materially increase economic hardship for current tenants," including a finding that alternative housing was available for current tenants and that the supply of vacant, comparable housing would not be affected. 12 U.S.C. § 4108(a). The Court of Federal Claims found that this was not a viable alternative for the markets involved here because "HUD could not make the factual findings that were a necessary predicate for prepayment approval." *Cienega IX*, 67 Fed.Cl. at 467. The record supports this finding. We will not address this option further since it was not available to the owners as a practical matter. *See also Cienega Gardens v. United States*, 265 F.3d 1237, 1239 (Fed.Cir. 2001) ("*Cienega VI*") (holding that the model plaintiffs' claims were ripe even though they did not seek approval from HUD to prepay the mortgages).

the purchasers, the owners could prepay the mortgage. *Id.* § 4114(a)(1)(B). While the mortgages could not be prepaid during the sale period, LIHPRHA permitted the owners to commence the sale process up to two years before their prepayment eligibility date. *Id.* § 4119(1)(B). Accordingly, if an owner promptly filed its notice of intent and if the sale process took approximately two years to complete,[3] the owner could sell the property or prepay the mortgage near the prepayment eligibility date. However, the statute imposed two additional restrictions. If prepayment occurred, the owners could not raise rents for three years following

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[3] The parties dispute precisely how long it would take to complete the sale process. The Court of Federal Claims did not make explicit factual findings regarding the duration of the sales period, but it stated that "[a] sale would take two years or more to complete." *Cienega IX*, 67 Fed.Cl. at 478. This statement was supported by testimony offered by the plaintiffs that "in some cases" it would "take approximately" two years to process a sale. J.A. 103237.

The two-year timeframe is supported by the deadlines set forth in the regulations. LIHPRHA permitted owners to file a notice of intent to sell the property twenty-four months before their original twenty-year prepayment eligibility date. 12 U.S.C. § 4119(1)(B) (2000). The owner's and HUD's appraisals were due within four months of the date that the owner filed the notice of intent. 24 C.F.R. § 248.111(i). If the owner and HUD did not agree on the appraisal value, they selected a third appraiser whose appraisal was due four months later. *Id.* § 248.111(j). Within one more month, HUD informed the owner whether it would approve the sale. *Id.* § 248.131(b). HUD then directed the owner to submit a second notice of intent. *Id.* § 248.131(b)(6). The owner submitted the second notice of intent within a month, which triggered the fifteen-month offer period. *Id.* § 248.133(b). Thus, according to the timeline set forth in the regulations, the process should take approximately twenty-five months.

prepayment and the owners were required to pay at least fifty percent of any displaced, low-income family's relocation expenses. *Id.* § 4113(b), (c)(1).

Congress also provided a carrot to those owners willing to stay in the program. Owners could elect to receive financial incentives by signing a "use agreement" with HUD. *Id.* § 4109. These incentives included limited increases in rents, increased access to residual receipts accounts, repair and capital improvement loans from HUD, HUD-insured loans that enabled owners to access equity in their properties through a second mortgage, and an increased allowed rate of return. *Id.* § 4109(b); *see Cienega IX,* 67 Fed.Cl. at 442; 24 C.F.R. § 248.231. In exchange for these incentives, owners had to agree to maintain the remaining restrictions "for the remaining useful life of such housing."[4] 12 U.S.C. § 4112(a)(2)(A) (2000).

III

None of the plaintiffs here elected to pursue the sale option, and only four of the plaintiffs entered into use agreements after ELIHPA expired but during the period that LIHPRHA was in effect.[5] All

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[4] Under LIHPRHA's transition provisions, any owner of housing that became eligible for low-income housing before January 1, 1991, who, before such date, filed a notice of intent under section 222 of ELIHPA could elect to proceed under either ELIHPA or LIHPRHA. Pub.L. No. 101-625, § 604 (codified as amended at 12 U.S.C. § 4101 note (Transition Provisions) (2000)). Any owner that elected to enter into a use agreement under the terms of ELIHPA was required to maintain the restrictions until the end of the forty-year mortgage. Pub.L. No. 100-242, § 224.

[5] These owners are Cienega Gardens, Del Amo Gardens, Las Lomas Gardens, and Chancellor Manor.

of the plaintiff owners brought suit in the Court of Federal Claims claiming, *inter alia,* that the enactment of ELIHPA and LIHPRHA, by restricting the owners' right to prepay and exit the program, constituted a taking and a breach of contract. The plaintiffs filed two separate actions—one brought in part by the Cienega Gardens plaintiffs[6] and one brought by the Chancellor Manor plaintiffs.[7] *See Chancellor Manor v. United States,* 51 Fed.Cl. 137 (2001); *Cienega Gardens v. United States,* 33 Fed.Cl. 196 (1995) ("*Cienega I*").

On March 28, 1996, after the Cienega Gardens lawsuit was filed but before the Chancellor Manor lawsuit was filed, and after the four plaintiffs had signed use agreements, Congress enacted the Housing Opportunity Program Extension Act of 1996, Pub.L. No. 104-120, 110 Stat. 834 (1996) ("HOPE"), which restored prepayment rights. *Id.* § 2(b). Congress enacted the appropriations statute for HUD one month later, on April 29, 1996, which included an express provision allowing an owner to prepay. Pub.L. No. 104-134, 110 Stat. 1321-265 to

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The government argues on appeal that these plaintiffs waived the right to bring a takings claim by entering into use agreements. We find no error in the Court of Federal Claims finding that there was no waiver, and therefore reject the government's argument. *See also Independence Park Apartments v. United States,* 449 F.3d 1235, 1247 (Fed.Cir. 2006) ("there is no indication in the use agreements that [the plaintiffs] were relinquishing their right to sue for damages caused by ELIHPA and LIHPRHA").

6 Cienega Gardens, Del Amo Gardens, Las Lomas Gardens, Blossom Hill Apartments, and Syline View Gardens.

7 Chancellor Manor, Gateway Investors, Ltd., and Oak Grove Towers Associates.

1321-293 (1996).[8] These provisions did not affect the previously executed use agreements.

Thus, as of April 29, 1996, the statute provided that the plaintiffs that had not entered into use agreements with HUD were free to prepay their mortgages and exit the program, although HOPE provided that owners that prepaid could not raise rents for an additional two months after prepayment. *See* § 2(b), 110 Stat. at 834-35. The plaintiffs that did enter into use agreements remained bound to maintain the restrictions either until the end of the forty-year mortgage (Cienega Gardens, Del Amo Gardens, Las Lomas Gardens) or for the useful life of the property (Chancellor Manor). 12 U.S.C. § 4112(a)(2)(A) (2000).

IV

In the course of the two litigations we established that the government, by limiting the prepayment rights, did not incur liability to the owners for breach of contract because HUD was not a party to the mortgage agreements. *Chancellor Manor,* 331 F.3d at 901; *Cienega IV,* 194 F.3d at 1234, 1246. This left only the takings claims to be resolved. After an initial decision by the Court of Federal Claims in the *Cienega Gardens* litigation

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[8] Later appropriations statutes reiterated the prepayment right. *See* Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub.L. No. 105-276, § 219, 112 Stat. 2461, 2487-88 (1998); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub.L. No. 104-204, 110 Stat. 2874, 2884 (1996) (codified at 12 U.S.C. § 4101 note (2000)). The 1998 appropriations statute added the condition that owners must provide 150 days' notice before prepaying under HOPE.

and a further remand by this court,[9] the Court of Federal Claims selected four model plaintiffs (Sherman Park Apartments, Independence Park Apartments, Pico Plaza Apartments, and St. Andrews Gardens Apartments) in the *Cienega Gardens* litigation. *See Cienega Gardens v. United States,* 38 Fed.Cl. 64 (1997) ("*Cienega III*"). The court entered judgment in favor of the government with respect to all plaintiffs. *Cienega Gardens v. United States,* No. 94-1C (Fed.Cl. Jan. 8, 2002). It did not render a detailed opinion but essentially followed its decision in *Alexander Investment v. United States,* 51 Fed.Cl. 102 (2001). *Alexander Investment* held, *inter alia,* that similarly situated

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[9] After the initial remand, the Court of Federal Claims granted summary judgment in favor of the government on the takings claims on the ground that the model plaintiffs' claims were not ripe because the owners did not exhaust their administrative remedies by requesting permission from HUD to prepay the mortgages before bringing suit. *Cienega Gardens v. United States,* 46 Fed.Cl. 506 (2000) ("*Cienega V*"). We rejected that argument on appeal and found that the model plaintiffs' claims were ripe. *Cienega VI,* 265 F.3d at 1239. We again remanded for consideration of the model plaintiffs' regulatory takings claims. *Id.*

Here the government again argues that the plaintiffs' claims are not ripe. The government argues that: (1) plaintiffs did not petition HUD for prepayment approval, and (2) they did not pursue the sale option. We reject these arguments. In light of our holding in *Cienega VI* and the factual findings made by the Court of Federal Claims, *see Cienega IX,* 67 Fed.Cl. at 460-61, we find that it would have been futile for the owners to apply to HUD for approval to prepay. Moreover, the ripeness doctrine does not require the owners to apply for voluntary incentives such as the sale option that they did not wish to pursue. While these incentives are pertinent to the *Penn Central* factors, they are not relevant to the ripeness analysis.

plaintiffs had no property interest that could be subject to a taking because HUD had reserved the right to amend the regulations governing sections 221(d)(3) and 236 and thus to alter the prepayment right. *Alexander Investment,* 51 Fed.Cl. at 107; *see* 24 C.F.R. §§ 221.749, 236.249 (1970). Alternatively, the Court of Federal Claims in *Alexander Investment* held that there was no regulatory taking under *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). The court found that there was no significant economic impact because "[t]he change in regulation did not remove the property from [the owner's] possession .... They continued to operate low-income housing." *Alexander Investment,* 51 Fed.Cl. at 109. Moreover, the plaintiffs did not demonstrate an investment-backed expectation because they "could have anticipated that Congress might concern itself with the possibility of a low-income housing shortage and act to prevent or delay such a shortage." *Id.* at 110.

On appeal, we reversed, based on a partial record and limited arguments made by the government, finding that the four model plaintiffs had suffered a compensable temporary regulatory taking and remanding with respect to the others. *See Cienega Gardens v. United States,* 331 F.3d 1319, 1324 (Fed.Cir.2003) ("*Cienega VIII*"). *Cienega VIII* decided several issues that are equally applicable to all parties in these cases.

First, regarding the character of the government action, we held that to constitute a compensable taking the statute need not "appropriate the owners' titles or dispossess them in any way," *id.* at 1339, nor does the restriction have to be permanent. *Id.*

Second, we disagreed that the plaintiffs needed to establish "that the prepayment restrictions denied them *all* economically beneficial use of their property in order for the takings to be compensable." *Id.* at 1343. We stated that "it is clearly not the law that only such 100% value regulatory takings are compensable." *Id.*

Third, we rejected the government's argument that the plaintiffs reasonably should have expected that the prepayment right would be eliminated because "plaintiffs knew that they were entering a sensitive and highly regulated field that was subject to continuing congressional interest and attention." *Id.* at 1350. We explained that "the fact that the industry is regulated [is not] dispositive" and that "*all* regulatory changes are [not] reasonably foreseeable." *Id.* We concluded that the owners could not reasonably have expected the change in the regulatory approach. *Id.*

In other respects, the holdings of *Cienega VIII* were unique to the four model plaintiffs and based on the particular arguments that the government made. Thus, for example, the trial court assumed that the appropriate approach was to consider the taking on a year-to-year basis by comparing lost income under the regulations to a market rate of return. *Id.* at 1343 n. 38. We stated that "the government neither argues error in the trial court's adoption of the plaintiffs' expert's calculation of rate of return value, nor error in the trial court's repeated rejection of the government's data." *Id.* at 1343 n. 40. Based on this assumption, we calculated that the model plaintiffs earned a return on their equity investment in the property that was about ninety-six percent less than what they could have earned by

investing their money elsewhere. *Id.* at 1343. Thus we found that "the Model Plaintiffs' expert's calculations ... proved sufficient financial loss on the part of the Model Plaintiffs ..., especially in view of the lack of any specific challenge by the government of the trial court's findings or of the Model Plaintiffs' methods and data." *Id.* at 1345.

The court in *Cienega VIII* did not resolve the takings issue with respect to the non-model Cienega Gardens plaintiffs, and we remanded for consideration of the other plaintiffs' takings claims. We expressly stated that the resolution of these aspects of the model plaintiffs' case did not preclude a different result for the non-model plaintiffs based on different arguments and a different record:

> The government has essentially waived any right to assert any errors in the Model Plaintiffs' arguments. Therefore, to the extent that the government can demonstrate affirmative errors through reference to additional evidence and flaws in the arguments in future cases in which plaintiffs make the same arguments, this opinion should not be understood to bar future courts from also considering that evidence and those arguments.

Cienega VIII, 331 F.3d at 1337 n. 31. Accordingly, we instructed the Court of Federal Claims on remand to "allow the [government and remaining plaintiffs] to develop an appropriate record and to rule on liability." *Id.* at 1354. We noted that "[o]n remand, the court may of course consider any materials presented by either party in furtherance of its case that are relevant under regulatory takings case law." *Id.*

We agreed with the *Cienega VIII* analysis in our decision in *Chancellor Manor,* 331 F.3d at 904-07. There we also remanded to the Court of Federal Claims for further factual findings pertinent to the *Penn Central* factors, concluding:

> [i]n rejecting the plaintiffs' and defendants arguments based on this record and by remanding for a more searching factual inquiry, we have not predetermined the question of whether the plaintiffs will be able to establish the existence of a regulatory taking under the *Penn Central* standards. ... At this stage we have done no more than reject the arguments of both the United States and the Owners that this matter can be properly decided on the present record.

Id. at 906-07.

On remand, the Court of Federal Claims consolidated the suits of the five remaining Cienega Gardens plaintiffs with the three Chancellor Manor plaintiffs. *Cienega IX,* 67 Fed.Cl. at 437-38. After conducting a bench trial, the court issued an opinion on August 29, 2005, finding that the government's actions constituted a temporary regulatory taking. *Id.* at 438. On November 22, 2005, the court issued an order awarding just compensation.[10]

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[10] The court calculated damages up until the end of the takings period or until the date of the judgment, whichever was earlier. Accordingly, the court awarded the following damages:

For present purposes, four aspects of the Court of Federal Claims decision are particularly pertinent. First, the court did not consider the impact of the regulation on the value of the property as a whole. The question the court asked was, for each year that the restriction was in effect, whether there was a compensable taking of income from the property. In determining the effect of the statute on the owners, the court applied a "return on equity approach," which compared the return the owner received on its investment for a one-year period under the regulations to a hypothetical return on its investment without the regulations. In other words, the court compared the owners' actual return under LIHPRHA, which was limited to a six percent return on the *initial equity* investment, to the return that the owner could have received on the *total equity* in its property without the restriction (twenty years of mortgage payments having increased the owner's

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Plaintiff	End of Takings Period or September 30, 2005 (date of judgment)	Amount of Just Compensation Awarded
Cienega Gardens	Oct. 10, 2002	$7,219,000
Del Amo Gardens	Sept. 30, 2005	$5,008,814
Las Lomas Gardens	Sept. 30, 2005	$13,017,377
Blossom Hill Apartments	Feb. 17, 1997	$2,801,347
Skyline View Gardens	Feb. 17, 1997	$2,228,032
Chancellor Manor	Sept. 30, 2005	$10,510,121
Oak Grove Towers	Mar. 1, 1997	$1,464,761
Gateway Investors (Rivergate)	Mar. 1, 1997	$1,697,241

equity). *Id.* at 475. The Court of Federal Claims found that this restriction of income during a discrete annual period was a significant financial detriment to the owners. Thus the return on equity approach treated the income from the property for each individual year as a separate property interest from the value of the property as a whole.

Second, the Court of Federal Claims did not factor into the takings analysis the offsetting benefits afforded under ELIHPA and LIHPRHA. The Court of Federal Claims noted that ELIHPA and LIHPHRA provide two options that operate in lieu of the contractual prepayment right: (1) selling the property at the fair market value to a HUD-approved purchaser or prepaying the mortgage in the absence of a sale, or (2) signing a use agreement. *Cienega IX,* 67 Fed.Cl. at 467. The Court of Federal Claims held that these benefits should not be taken into account in determining whether a taking occurred, though they were relevant in determining the amount of just compensation. *Id.* at 470.

Third, the court did not include, as a factor in its analysis, the limited duration of ELIHPA and LIHPRHA, and the restrictions that these statutes imposed. The court calculated the annual return on equity for discrete periods beginning at the original prepayment date. *Id.* at 476. The court only considered the duration of the restriction for the purpose of calculating just compensation.

Finally, the court considered the reasonable investment-backed expectations of the property owners. *Id.* at 471. The court first addressed the plaintiffs' subjective expectations in entering into the programs. *Id.* at 471-72. The court concluded that both groups of plaintiffs "expected to prepay

when they invested in their properties." *Id.* The court then found that the owners' expectations of prepayment were reasonable "given the deed of trust notes, the existing regulations, the type of properties involved, the location of the properties, and the importance of an exit strategy in entering such a program." *Id.* at 474. The court did not consider whether there was a nexus between the owners' expectations and their investment in the property.

The government timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3) (2000).[11] We now order the cases consolidated for purposes of this appeal.

DISCUSSION

We review the Court of Federal Claims' legal determinations without deference and its findings of fact for clear error. *Bass Enters. Prod. Co. v. United States,* 381 F.3d 1360, 1365 (Fed.Cir.2004). Whether a compensable taking under the Fifth Amendment has occurred is a question of law that is based on factual determinations. *Id.*

We deal here with an alleged regulatory taking rather than a physical taking. The focus of the regulatory takings analysis is on fundamental fairness—is it fair for the government to impose the cost of a regulation on private parties rather than on

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[11] Given the interrelation between the two cases and because two separate panels heard the prior appeals, we heard this appeal as a seven-judge panel pursuant to our statutory authority under 28 U.S.C. § 46(b), which provides that the "Federal Circuit ... may determine by rule the number of judges, not less than three, who constitute a panel." *See also* Fed. Cir. R. 47.2(a) ("Cases and controversies will be heard and determined by a panel consisting of an odd number of at least three judges, two of whom may be senior judges of the court.").

the public as a whole through public spending? *See Palazzolo v. Rhode Island,* 533 U.S. 606, 618, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001); *Penn Cent.,* 438 U.S. at 123, 98 S.Ct. 2646. To make this determination, there is no set formula. "[T]here simply is no bright line dividing compensable from noncompensable exercises of the Government's power when a regulatory imposition causes a partial loss to the property owner. What is necessary is a classic exercise of judicial balancing of competing values." *Fla. Rock Indus., Inc. v. United States,* 18 F.3d 1560, 1570 (Fed.Cir.1994). Thus the regulatory takings analysis is "characterized by an 'essentially ad hoc, factual inquir[y]' ... designed to allow 'careful examination and weighing of all the relevant circumstances.'" *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Authority,* 535 U.S. 302, 322, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (quoting *Penn. Cent.,* 438 U.S. at 124, 98 S.Ct. 2646, and *Palazzolo,* 533 U.S. at 636, 121 S.Ct. 2448 (O'Connor, J., concurring)).

The Supreme Court in *Penn Central* identified three factors that have "particular significance" to this "ad hoc, factual inquir[y]." 438 U.S. at 124, 98 S.Ct. 2646. First, courts must consider the character of the governmental action. *Id.* This is the precise action that the government has taken and the strength of the governmental interest in taking that action. Second, courts must consider the economic impact on the regulated parties. *Id.* Finally, courts must consider whether the regulated parties had reasonable investment-backed expectations that they would not be subjected to such regulation. *Id.* The *Penn Central* test is the same whether the regulation is permanent or temporary in nature,

although in the latter situation, the court must carefully consider the duration of the restriction under the economic impact prong. *See Tahoe-Sierra,* 535 U.S. at 342, 122 S.Ct. 1465.

In addressing these questions, we must direct ourselves to the practical realities of the situation. That assessment can be difficult where there is a complex legislative scheme that, as here, is not a model of draftsmanship. But the fact that the legislative scheme is complex and confusing makes it all the more important to consider carefully the actual impact of the legislation on the claimants. Notwithstanding the Court of Federal Claims' careful opinion, the court has in several respects committed error.

I *ELIHPA*

As an initial matter, we consider whether ELIHPA constituted a taking. The owners do not separately argue that ELIHPA constitutes a taking, and there is no basis for treating ELIHPA and LIHPRHA the same. ELIHPA was a temporary restriction that was enacted on February 5, 1988, and was only in effect until LIHPRHA was enacted on November 28, 1990. None of the owners' twenty-year prepayment deadlines expired during the period that ELIHPA was in effect, and the owners that entered into use agreements all signed the agreements well after LIHPRHA was enacted.[12] There has been no showing that ELIHPA restricted the plaintiff owners' freedom of action in any

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[12] Cienega Gardens and Del Amo Gardens entered into use agreements on May 26, 1995. Las Lomas Gardens entered into its use agreement on May 16, 1995. Chancellor Manor entered into its use agreement on February 14, 1995.

meaningful way. *See Greenbrier v. United States,* 193 F.3d 1348, 1357 (Fed.Cir.1999) ("In order to successfully assert a regulatory takings claim, the Owners must establish ... that the regulation has in substance 'taken' their property by going 'too far ....'"). Accordingly, we find that ELIHPA did not effectuate a taking with respect to these owners.

II *LIHPRHA*

The more serious question is whether the enactment of LIHPRHA constituted a taking. During the period that LIHPRHA was in effect (from November 28, 1990, until the HUD appropriations statute implementing HOPE was enacted on April 29, 1996) the plaintiff owners' twenty-year prepayment deadline expired and some of the owners, in view of the regulatory regime imposed by LIHPRHA, entered into use agreements. The question is whether these restrictions imposed by LIHPRHA resulted in a taking. In our view, in concluding that they did, the Court of Federal Claims erred as a matter of law in certain respects.

A. *Need To Consider the Effect on the Property as a Whole*

We think the Court of Federal Claims erred in not considering the impact of the restriction on the property as a whole. Rather, the Court of Federal Claims compared the rate of the return that the owner would receive on its investment with and without the restriction of a single year. This error impacted the court's *Penn Central* analysis.

The Court of Federal Claims applied a "return-on-equity" approach, considering the income from the project for each individual year as a separate property interest. *Cienega IX,* 67 Fed.Cl. at 475-76.

For each owner, the court compared the return on equity that the owner received under the restrictions with the return on equity that the owner would receive absent the restrictions. The court determined that, under LIHPRHA, the owner's return was limited to a six percent dividend on its *initial equity* investment. The court found that without the restrictions the owner could receive an 8.5 percent annual return (the Fannie Mae bond rate) on the owner's *entire equity* in the property at the prepayment eligibility date. The initial equity investment was significantly smaller than the entire equity value at the prepayment date because the owners had built equity in the property over the twenty-year period by making mortgage payments. Accordingly, the court found that the economic impact on the plaintiffs ranged from 90.5 to 97.7 percent. *Id.* at 476-78.

We believe that, in adopting this approach, the Court of Federal Claims erred. The Supreme Court, in cases like *Penn Central, Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California,* 508 U.S. 602 (1993), and *Tahoe-Sierra* has made clear that in the regulatory takings context the loss in value of the adversely affected property interest cannot be considered in isolation.

Penn Central, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, arose in the permanent regulatory takings context. New York City had designated Penn Central station, and the city block that it sat on, as a historic landmark site, and thus restricted development of the property. The appellants argued that the taking at issue was a taking of the air space above Penn Central station. The appellants urged

that the economic impact of this restriction on developing the air space should be considered in isolation, rather than considering the property as a whole. *Id.* at 130. The Supreme Court rejected this approach as "quite simply untenable." *Id.* The Court explained:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."

Id. at 130-31.

The Supreme Court reaffirmed that the correct approach is to consider the "parcel as a whole" in *Concrete Pipe,* 508 U.S. at 643-44, 113 S.Ct. 2264. There the Court reiterated *Penn Central's* holding:

> [A] claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question.

Id. at 644, 113 S.Ct. 2264. The Court explained that "our test for regulatory taking requires us to compare the value that has been taken from the

property with the value that remains in the property, [and] one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'" *Id.* (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 497, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987)); *see also Andrus v. Allard,* 444 U.S. 51, 65-66, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979) ("where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety"); *Seiber v. United States,* 364 F.3d 1356, 1368 (Fed.Cir.2004) ("The Supreme Court has repeatedly instructed that the impact of an alleged taking must be considered in terms of the 'parcel as a whole' ....").

In *Tahoe-Sierra,* the necessity of considering of the overall value of the property was explicitly confirmed in the temporary regulatory takings context. 535 U.S. at 331, 122 S.Ct. 1465. There the petitioners argued that a thirty-two-month moratorium on building was a per se regulatory taking because there had been a complete taking of development rights during that thirty-two-month period. The Supreme Court rejected this argument stating:

> Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings. Petitioners' "conceptual severance" argument is unavailing because it ignores *Penn Central*'s admonition that in regulatory

> takings cases we must focus on "the parcel as a whole."

Id. The Court thus concluded that "the District Court erred when it disaggregated petitioners' property into temporal segments corresponding to the regulations at issue and then analyzed whether petitioners were deprived of all economically viable use during each period." *Id.* Justice Thomas's dissent specifically complained that the majority had improperly compared the reduction in value resulting from the regulation to the value of the parcel as a whole, *i.e.,* the "land's infinite life." *Id.* at 355, 122 S.Ct. 1465 (Thomas, J., dissenting). Thus we conclude that in a temporary regulatory takings analysis context the impact on the value of the property as a whole is an important consideration, just as it is in the context of a permanent regulatory taking.

The plaintiffs justify the return-on-equity approach by relying on the Supreme Court's decision in *Kimball Laundry Co. v. United States,* 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949), which held that just compensation for the taking of a laundry was "the rental that probably could have been obtained." *Id.* at 7, 69 S.Ct. 1434. However, the reasoning of *Kimball Laundry* does not apply here. First, as the plaintiffs recognize, the Supreme Court in *Kimball Laundry* applied the return on equity approach when determining just compensation and not when determining whether a taking had occurred in the first place. Second, *Kimball Laundry* is a physical takings case and thus does not govern the regulatory takings context. As the Supreme Court concluded in *Tahoe-Sierra,* "[t]his longstanding distinction between acquisitions of property for public use, on

the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." 535 U.S. at 323, 122 S.Ct. 1465; *see also Tuthill Ranch, Inc. v. United States,* 381 F.3d 1132, 1135 (Fed.Cir.2004) ("The Supreme Court has recognized that the government may 'take' private property by either physical occupation or regulation, and that these two categories of takings are subject to different analyses.")

Consideration of the property as a whole is particularly important because our cases have established that a regulatory taking does not occur unless there are serious financial consequences. In *Cienega VIII,* we stated that "[w]hat has evolved in the case law is a threshold requirement that plaintiffs show 'serious financial loss' from the regulatory imposition in order to merit compensation." 331 F.3d at 1340; *see Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171, 1177 (Fed.Cir.1994). We previously have explained that the requirement of "severe economic deprivation" comes from the nature of regulatory takings claims, which lack "the 'typically obvious and undisputed' predicate of a physical invasion or appropriation of private property by the government" and are "in essence, a claim that 'a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation.'" *Rose Acre Farms, Inc. v. United States,* 373 F.3d 1177, 1195 (Fed.Cir.2004) (quoting *Tahoe-Sierra,* 535 U.S. at 322 n. 17, 122 S.Ct. 1465).

We note that in a temporary taking situation, there appear to be at least two ways to compare the value of the restriction to the value of the property as a whole so as to determine if there has been severe economic loss. *See Rose Acre Farms,* 373 F.3d at 1188 (stating that "there are a number of different ways to measure the severity of the impact of the restrictions"). First, a comparison could be made between the market value of the property with and without the restrictions on the date that the restriction began (the change in value approach). The other approach is to compare the lost net income due to the restriction (discounted to present value at the date the restriction was imposed) with the total net income without the restriction over the entire useful life of the property (again discounted to present value). Neither approach appears to be inherently better than the other, and on remand the Court of Federal Claims should consider both as well as any other possible approaches that determine the economic impact of the regulation on the value of the property as a whole.[13]

B. *Need To Consider the Offsetting Benefits*

The second error committed by the Court of Federal Claims lies in its failure to consider the offsetting benefits that the statutory scheme afforded which were specifically designed to

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[13] We note, however, that the Court of Federal Claims awarded Chancellor Manor $10.5 million in damages—significantly more than the property's appraised value of $7 million. *See Cienega IX,* 67 Fed.Cl. at 477 n. 54. Logically speaking, the government cannot take more than what the plaintiffs actually possess. A determination that damages exceed the value of the property should be indicative that the method of computing damages is flawed.

ameliorate the impact of the prepayment restrictions. This error affects all of the plaintiffs. The Court of Federal Claims characterized the government's argument as "overreaching," *Cienega IX,* 67 Fed.Cl. at 470, theorizing that "Congress may not establish through an option that it will provide value equal to forty, or fifty, or sixty cents on the dollar for a taking, and thereby evade paying the constitutionally-required just compensation." *Id.* The court stated that the value of any options the plaintiffs were offered should not "change the character of the governmental action or the way that the *Penn Central* takings analysis is applied." *Id.* The court held instead that any benefits "should be addressed in the determination of just compensation," not as part of the takings analysis. *Id.*

The Supreme Court in *Penn Central,* 438 U.S. at 137, 98 S.Ct. 2646, clearly held that offsetting benefits must be accounted for as part of the takings analysis itself. There, in exchange for restrictions on the development of historic properties, New York City's zoning laws provided developers with the right to develop nearby parcels that the developer already owned. *Id.* at 113-14, 98 S.Ct. 2646. The Court explained that "to the extent appellants have been denied the right to build above the [Penn Central] Terminal, it is not literally accurate to say that they have been denied all use of even those pre-existing air rights." *Id.* at 137, 98 S.Ct. 2646. Thus, the plaintiff's "ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal." *Id.* The Court concluded that these benefits "undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that

reason, are to be taken into account in considering the impact of the regulation." *Id.*

The Court of Federal Claims did not take into account this aspect of the *Penn Central* decision, finding support for its holding instead in our decisions in *Whitney Benefits, Inc. v. United States,* 926 F.2d 1169 (Fed.Cir.1991), and *Whitney Benefits, Inc. v. United States,* 752 F.2d 1554 (Fed.Cir.1985). The *Whitney Benefits* cases provide no support for the Court of Federal Claims' approach. At issue in the *Whitney Benefits* cases was a statute that prevented a land owner from mining its property, but, in exchange, the Department of the Interior was authorized "to agree with such [land owners] to convey the fee to, or lease in exchange, other federal land embodying coal deposits." *Whitney Benefits,* 752 F.2d at 1555. This court stated that the value of the new property offered in exchange for the restriction could not be considered under the takings analysis because "the exchange transaction is a method of ascertaining and paying just compensation for a taking, which may be negotiated and agreed upon either before or after the taking itself, and is optional with the claimants." *Whitney Benefits,* 926 F.2d at 1175; *see also Whitney Benefits,* 752 F.2d at 1560. However, unlike in *Penn Central* where the benefits were tied to the property already owned by the affected parties, in *Whitney Benefits* the government offered those parties *new* properties.

This case does not involve a transfer of new property to the owner as in *Whitney Benefits,* but rather an amelioration of the restrictions imposed on the existing property. There can be no claim here that the government compensated the owner by

providing substitute property. The benefits must be considered as part of the takings analysis.[14]

The Court of Federal Claims, we think, overstated the effect of the statute when it concluded that "[n]one of the options available to plaintiffs permitted them to exercise their right to transfer their property to a purchaser of their choice." *Cienega IX,* 67 Fed.Cl. at 467. As a practical matter LIHPRHA provided owners with two alternatives: (1) the right to sell the property at its fair market value or, if there was no offer or if HUD failed to provide financial assistance to the purchasers, the right to prepay the mortgage and eliminate the regulatory restrictions; or (2) entering into a use agreement with HUD under which HUD would provide financial incentives to the owner. *See* 12 U.S.C. §§ 4107, 4110 (2000).

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[14] Such benefits, of course, would be pertinent as well to a just compensation analysis if a taking had occurred. In *Cienega VIII,* we held that a taking had occurred with respect to the model plaintiffs (two of which had entered into use agreements under LIHPRHA—Sherman Park and St. Andrews), and directed the Court of Federal Claims to enter the damages awarded in *Cienega III,* 38 Fed.Cl. 64. *See Cienega VIII,* 331 F.3d at 1353. On remand, the Court of Federal Claims reinstated the damages award for the model plaintiffs, and we reviewed that award in *Independence Park Apartments v. United States,* 449 F.3d 1235 (Fed.Cir.2006). There we stated that, for purposes of determining just compensation, "the calculation of damages should be adjusted [for the two model plaintiffs that entered into use agreements] to treat the ban on prepayment as lasting as long as the use agreements provided for, with the amount of the damages adjusted to account for any benefits ... obtained as a result of the use agreements." *Id.* at 1248. However, the *Independence Park* decision does not suggest that these benefits should not also be considered as part of the takings analysis.

With respect to the first option, the owners here do not dispute that the opportunity for a fair market value sale would eliminate any takings claim. *See Florida Rock Indus., Inc. v. United States,* 791 F.2d 893, 903 (Fed.Cir.1986) ("if there is found to exist a solid and adequate fair market value [for the property] which [the owner] could have obtained from others for that property, that would be a sufficient remaining use of the property to forestall a determination that a taking had occurred or that any just compensation had to be paid by the government"). Rather the owners complain that sale to qualified buyers was unlikely, that the sale process took time during which the rent and other restrictions remained in place, that appraisal value was not adjusted over the course of the two-year sale period, and that prepayment was not possible until the sale process was complete (and unsuccessful). However, any trouble finding a buyer only increased the probability that the owner would be able to prepay if a sale was not completed.

Moreover, the sale process was not as time consuming as the plaintiffs assert. To reduce any administrative delays, LIHPRHA permitted the owners to begin the sale process by filing a notice of intent up to two years before their prepayment eligibility date. 12 U.S.C. § 4119(1)(B) (2000). The owners and HUD would then appraise the property to determine "the fair market value of the housing based on the highest and best use of the property." *Id.* § 4103(b)(2). Upon HUD's approval of the sale, the owner would file a second notice of intent with

HUD.[15] *Id.* § 4106(d)(1). This triggered a fifteen month period for which the owner was required to keep the offer to sell open. *Id.* § 4110(b)(1). First, the owner was required to make an offer to sell to a "priority purchaser" for twelve months. *Id.* § 4111(b)(1). A "priority purchaser" was a resident council organization or a nonprofit organization "that agrees to maintain low-income affordability restrictions for the remaining useful life of the housing." *Id.* § 4121(a). The negotiated sale price could not exceed the appraised value of the property. *Id.* § 4110(b)(1). If no priority purchaser made an offer, the owner was required to hold the offer open for three additional months to any "qualified purchaser." *Id.* § 4110(c). A "qualified purchaser" was "any entity that agree[d] to maintain low-income affordability restrictions for the remaining useful life of the housing." *Id.* § 4121(b). If no sale was completed after fifteen months, the owner could then prepay the mortgage. Alternatively, if HUD failed to provide assistance to the purchasers to enable them to complete the sale, the owner also could prepay the mortgage. *Id.* § 4114(a)(1)(B). However, the prepaying owner could not raise the rents for any tenants who were residents when the owner filed its notice of intent to sell the property for three years. *Id.* §§ 4113(c)(1), 4114(a).

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[15] The requirement for HUD approval of the sale did not substantially affect the process. If HUD approval was not forthcoming, the various options were still largely available. In effect, the owner could still offer the property for sale and prepay if the sale did not occur. The only lost opportunity was apparently the ability to negotiate the price. *See* 12 U.S.C. § 4111(b)(1), (c).

The duration of these restrictions is an important factor in the takings analysis. The Supreme Court in *Tahoe-Sierra* concluded that "the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim." 535 U.S. at 342, 122 S.Ct. 1465; *see also Rose Acre Farms, Inc. v. United States,* 373 F.3d 1177, 1195 (Fed.Cir.2004) (instructing the trial court to consider the temporary nature of the restriction—two years—on remand). Thus to the extent that owners could initiate and complete the process near the original prepayment date and sell the property for fair market value, the restriction had no practical significance beyond the three-year restriction on raising rents and the requirement that the owner pay a portion of tenants' relocation expenses. On remand, the Court of Federal Claims should assess whether the sale process prescribed by LIHPRHA provided the opportunity for a fair market value sale at or near the original prepayment date.

Alternatively, an owner could enter into a use agreement. The owner was required to file a "plan of action."[16] 12 U.S.C. § 4107(a) (2000). This plan of action included the types of financial incentives requested. *Id.* § 4107(b)(1)(A)-(F). These incentives included the right to earn higher dividends, rent increases for current tenants, repair and capital improvement loans, and second mortgages.[17]

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[16] The owner was required to file the plan of action within six months of HUD's determination that the preservation rents were within the federal cost limit. 12 U.S.C. § 4107(a) (2000).

[17] Specifically, LIHPRHA authorized HUD to provide the following incentives: increased access to residual receipts

LIHPRHA required HUD to approve the plan if it was "the least costly alternative that [was] consistent with the full achievement of the purposes of this title" and if the owner made a binding commitment to extend the restrictions on the property, including agreeing that "the housing [would] be retained as housing affordable for very low-income families or persons, low-income families or persons, and moderate-income families or persons for the remaining useful life of such housing." *Id.* § 4112(a)(1)-(2). If HUD approved the plan but did not provide the funding incentives within fifteen months, the owner could prepay the mortgage. *Id.* § 4114(a)(1)(A). If the owner did prepay under this circumstance, as with a sale, the owner was still prohibited from raising rents on any existing tenants for three years following prepayment and was

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accounts; an increase in the rents permitted under an existing contract under section 1437f of Title 42, or additional assistance under section 1437f of title 42 or an extension of any project-based assistance attached to the housing (subject to the availability of amounts provided in appropriations Acts); an increase in the rents on units occupied by current tenants as permitted under section 4112 of LIHPRHA; financing of capital improvements under section 201 of the Housing and Community Development Amendments of 1978; financing of capital improvements through provision of insurance for a second mortgage under LIHPRHA; in the case of housing defined in section 4119(1)(A)(iii) of LIHPRHA, redirection of the Interest Reduction Payment subsidies to a second mortgage; access by the owner to a portion of the preservation equity in the housing through provision of insurance for a second mortgage loan insured under section 1715z-6(f) of LIHPRHA or a non insured mortgage loan approved by the Secretary and the mortgagee; or other incentives authorized in law. 12 U.S.C. § 4109(b) (2000).

required to pay fifty percent of relocation expenses. *Id.* § 4113(b), (c)(1).

The sale and use agreement options thus conferred considerable benefits on the owners. The major effect of the statute on an owner who did not elect to enter into a use agreement and wished to prepay was to keep the restrictions in place during the sale period which might expire near the prepayment date; to compel the owner to offer the property for sale at a fair market value; and, if there was no sale (and the owner prepaid the mortgage), to restrict rent increases for a three-year period. This sale option was plainly an available alternative because many owners in fact elected to sell their property. *See Cienega IX,* 67 Fed.Cl. at 444 (noting that of a group of 205 to 210 projects in California, 37 percent intended to sell); *see also* Cienega Gardens J.A. at 103174 (testimony by Richard Mandel, from the California Housing Partnership Corporation, that he was not "aware of any [properties involved in the sale process] that did not receive a bona fide offer").

The benefits to the owners electing to enter into use agreements were also considerable, as confirmed by the legislative history to LIHPRHA. "The bill authorize[d] an array of financial incentives" that "[t]he Committee believe[d] .... [would] provide sufficient economic incentive for the vast majority of owners of eligible low income housing to retain the current use and occupancy restrictions on their projects." H.R.Rep. No. 101-559, at 76 (1990); *see also* 136 Cong. Rec. H6053-01 (July 31, 1990) (statement of Rep. Conte) ("The provision offers a package of incentives for owners to maintain their projects as low-income housing."). When signing

LIHPRHA, President Bush expressed concern that the incentives were in fact too generous:

> One important preservation strategy is to provide project owners with economic incentives to maintain their properties for low-income use. I am concerned, however, that the incentives in S. 566 are more generous than are necessary, providing excessive benefits over the long term that will be paid by all taxpayers.

Statement on Signing the Cranston-Gonzalez Nation Affordable Housing Act, 26 Weekly Comp. Pres. Doc.1931 (Nov. 28, 1990). The President's sentiment was echoed in the hearings leading to the enactment of HOPE, where HUD's Inspector General testified that the government should "[d]iscontinue paying owners windfall profits for projects that threaten to prepay their mortgages and remove the low income character of the units." Hearing Before the Subcomm. on VA, HUD, and Independent Agencies of the H. Comm. on Appropriations, 104th Cong., 1st Sess. (Jan. 24, 1995) (statement of Susan Gaffney, HUD Inspector General).

In summary, we think the Court of Federal Claims erred in not considering offsetting benefits with respect to those owners who entered into use agreements and those that did not. In considering whether the owners that elected to enter into use agreements suffered a taking, available offsetting benefits must be taken into account generally, along with the particular benefits that actually were offered to the plaintiffs.

C. *Need To Consider the Duration of the Legislation*

In its decision, the Court of Federal Claims did not consider the duration of the legislation. We believe existing takings law requires consideration of the duration of the legislation as part of the takings analysis. *See Tahoe-Sierra,* 535 U.S. at 342, 122 S.Ct. 1465. The LIHPRHA restrictions remained in effect from November 28, 1990, until the HUD appropriations statute, implementing HOPE, was enacted on April 29, 1996.[18] Four owners did not enter into use agreements and were thus relieved of the LIHPRHA restrictions in April 26, 1996, when the HOPE appropriation was enacted.[19] These

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[18] The Court of Federal Claims found that, after the enactment of HOPE, HUD "exerted strenuous efforts" to extend LIHPRHA's prepayment restriction by issuing preservation letters that refused to permit prepayment without HUD approval. 67 Fed.Cl. at 480; *see id.* at 445, 468. The court concluded that HUD's actions "extend[ed] the takings period beyond the enactment of HOPE." *Id.* at 480. We find that the Court of Federal Claims erred in extending the takings period beyond the enactment of HOPE. We have stated that "[a] compensable taking arises only if the government action in question is authorized." *Del-Rio Drilling Programs Inc. v. United States,* 146 F.3d 1358, 1362 (Fed.Cir.1998). The owner's remedy for HUD's refusal to recognize the effect to the HOPE legislation was to bring an action in a United States district court under the Administrative Procedure Act challenging HUD's actions. *Id.* at 1363.

[19] These owners are Blossom Hill, Skyline View Gardens, Gateway Investors (Rivergate), and Oak Grove. Both Blossom Hill and Skyline View Gardens filed notices of intent to sign use agreements, but HUD never funded those agreements. If the incentives had remained unfunded for fifteen months, Blossom Hill and Skyline View would have been permitted to prepay their mortgages. However, HOPE was enacted before Blossom Hill and Skyline View prepaid under LIHPRHA. *See Cienega IX,* 67 Fed.Cl. at 450-52. Gateway and Oak Grove also filed notices of intent to sign use agreements, but they

owners only had their prepayment rights restricted for at most a short period—from nineteen to twenty-seven months—when the legislation was in effect.[20] The Court of Federal Claims erred in not considering the duration of the legislation in deciding whether a taking had occurred. On remand, the court must consider that the owners who did not enter into use agreements were only subjected to the legislation for a limited period of 19 to 27 months.

Four of the owners elected to enter into use agreements after the enactment of LIHPRHA but before the HOPE enactment: Cienega Gardens, Del Amo Gardens, Las Lomas Gardens, and Chancellor Manor. The temporary nature of the legislation is irrelevant with respect to those who had use agreements in place when HOPE was enacted since those owners acted reasonably on the assumption that the restrictions were permanent.

D. *Need To Consider the Nexus Between the Investment and the Expectation*

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withdrew their applications upon hearing that Congress was considering the HOPE legislation. *Id.* at 455-56.

[20] The HOPE appropriation was enacted on April 26, 1996, and HOPE provided that owners could not raise rents for two months following prepayment. Pub.L. No. 104-120, § 2(b), 110 Stat. 834-35. Accordingly, Blossom Hill's twenty-year prepayment period expired on October 31, 1994, meaning that the restriction period lasted roughly 20 months. Skyline View's twenty-year prepayment period expired on March 15, 1994, meaning that the restriction period lasted roughly 27 months. Gateway's twenty-year prepayment period expired on June 6, 1995, meaning that the restriction period lasted roughly 19 months. Oak Grove Towers's twenty-year prepayment period expired on January 31, 1994, meaning that the restriction period lasted roughly 26 months.

Finally, the Court of Federal Claims erred in its treatment of the investment-backed expectations prong of the *Penn Central* analysis. *See* 438 U.S. at 124, 98 S.Ct. 2646. In *Cienega VIII,* we explained that, in determining whether the plaintiffs had a reasonable investment-backed expectation, "we start with an analysis of the ... [p]laintiffs' actual expectation because we require actual expectation of, or reliance on the government not nullifying the ... [p]laintiffs' contractual and regulatory rights as a threshold matter." 331 F.3d at 1346. If the plaintiffs demonstrated a subjective reliance on the prepayment provision, the court was then required to "determine whether a reasonable developer in the ... [p]laintiffs' circumstances would believe that the twentieth-year prepayment right was guaranteed by the regulations and that HUD 'authorized' and endorsed mortgage contracts expressly including it." *Id.* at 1348 (internal citation omitted). As with the other factors, the burden is on the owners to establish a reasonable investment-backed expectation in the property at the time it made the investment. *Forest Props., Inc. v. United States,* 177 F.3d 1360, 1367 (Fed.Cir.1999).

We find no error in the Court of Federal Claims' conclusion that the owners subjectively expected to have the option to prepay their mortgages after twenty years. However, we do think the Court of Federal Claims erred in part in its analysis of the reasonableness of the plaintiffs' expectations.

One important aspect of investment-backed expectations is whether, in the regulatory environment, it would be expected that the law might change to impose liability. The test in this respect was set forth at length in *Commonwealth*

Edison Co. v. United States, 271 F.3d 1327 (Fed.Cir.2001) (en banc).[21] There we explained that "[t]he reasonable expectations test does not require that the law existing at the time of [entering into the program] would impose liability, or that liability would be imposed only with minor changes in then-existing law. The critical question is whether extension of existing law could be foreseen as reasonably possible." *Id.* at 1357. Conducting an analysis under *Commonwealth,* we explained in *Cienega VIII* that "[w]e have no evidence that the housing programs involved here were part of" such a highly regulated field that the owners' expectations were necessarily unreasonable. 331 F.3d at 1350. We concluded that the plaintiffs could not reasonably have expected the change in regulatory approach. *Id.; see also Chancellor Manor,* 331 F.3d at 904. We see no basis for revisiting this issue.

However, the reasonable expectations prong also requires that the expectations be investment backed, and in this regard further analysis is required. The first step of the analysis is to determine the actual investment that the general and limited partners made in the property. The second step is to determine the benefits that the owners reasonably could have expected at the time they entered into the investment. The third step is to determine what expected benefits were denied or restricted by the government action. (The latter two have been

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[21] While *Commonwealth Edison* was a due process case, we have recognized that it governs in the closely related takings area as well. *See Cienega VIII,* 331 F.3d at 1346 n. 42; *Chancellor Manor v. United States,* 331 F.3d 891, 904 (Fed.Cir.2003); *see also Appolo Fuels, Inc. v. United States,* 381 F.3d 1338, 1349 n. 5 (Fed.Cir.2004).

discussed earlier in this opinion.) In other words, it is impossible to determine whether the owners' expectations were reasonable without knowing the total value of the investment; its relationship to the benefits available to the owners, including any tax benefits; and the anticipated benefits that were denied or restricted by the government action.[22] Finally, the claimant must establish that it made the investment because of its reasonable expectation of receiving the benefits denied or restricted by the government action, rather than the remaining benefits. The importance of this analysis is confirmed by the cases. For example, in *Penn Central,* the Supreme Court explained that the takings analysis requires consideration of "the extent to which the regulation has interfered with distinct investment-backed expectations." 438 U.S. at 124, 98 S.Ct. 2646. The Supreme Court noted that a taking does not lie where the restriction "did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant," *id.* at 125, 98 S.Ct. 2646, but that "a ... statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" *Id.* at 127, 98 S.Ct. 2646. The Court determined that the relevant investment in *Penn Central* was the purchase of the property before the zoning

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[22] In conducting this analysis, the court should consider any reduction in the return that would be the result of phantom income resulting in tax liability without the receipt of actual income. In determining the return for the general partners, the court should make allowance for any nonmonetary contributions, such as the performance of services without compensation.

regulation was enacted and that the expectation was that it would be used as a rail terminal. Thus "the New York City law [did] not interfere in any way with the present uses of the Terminal. Its designation as a landmark ... contemplate[d] that appellants [could] continue to use the property precisely as it ha[d] been used for the past 65 years." *Id.* at 136, 98 S.Ct. 2646. The Court concluded that the zoning restriction did "not interfere with what must be regarded as Penn Central's *primary expectation* concerning the use of the parcel." *Id.* at 136 (emphasis added); *see also MacLeod v. Santa Clara County,* 749 F.2d 541, 547 (9th Cir.1984) ("[I]t is clear that the denial of the permit did not interfere with MacLeod's primary 'investment-backed expectation' concerning the use of the parcel.").

Based on *Penn Central,* the government argues that "a taking will not lie" "where multiple uses can be expected of property, but the law does not interfere with an owner's '*primary*' investment-backed expectation." Chancellor Manor Appellant's Br. at 56 (emphasis added). The owners disagree with the government's formulation of the reasonable investment-backed expectations test, and argue instead that "an expectation—even if not the 'primary' one—is nonetheless 'investment-backed' if an investor would not have invested but for the expectation." Cienega Gardens Appellees' Br. at 52. While the government's view appears to be supported by *Penn Central,* we need not determine at this stage in the proceeding whether the reason for the investment must be the "primary" expectation or simply that reasonable owners would not have invested "but for" the expectation for as yet the owners have not established either standard.

In addressing this question on remand, it is particularly important that the Court of Federal Claims first determine the precise scope of the benefits denied. The owners were not, as discussed earlier, entirely denied the right to prepay; rather that right was denied for a short period, and rents were frozen for a period after prepayment. The Court of Federal Claims must determine on remand whether the rights thus denied were the primary or "but for" cause of the investment. At this stage, the plaintiffs have not established that a reasonable owner's expectation of an unrestricted right of prepayment after twenty years would have satisfied either standard. The substantial benefits that the owners received, other than the absolute prepayment right, may well have been such that the absolute prepayment right might not have been either the primary or "but for" reason that a reasonable owner would have invested in the property. Indeed, it is not even clear that a reasonable owner would rely on any aspect of the prepayment right in making the investment, much less that a reasonable owner would rely on an unrestricted right to prepayment.

In determining whether expectations of prepayment were reasonably investment backed, it is necessary to inquire as to the expectations of the industry as a whole. Here the expert testimony on this issue was conflicting and, unfortunately, was limited to the expectations as to the general prepayment right rather than the expectations as to the limited restrictions actually imposed by the statute. On one hand, at trial the government presented the expert testimony of Kenneth Malek, an expert in tax accounting and tax-advantaged

investments. He testified that "neither the general partners nor the limited partners considered residual value [of the property] to be a significant motivation." Chancellor Manor J.A. 102633. This was because "[t]he dividends that could be paid as operating cash flow distributions to the investors were limited, and so the benefits that made a material impact on the project from the standpoint of the present value of those benefits were the tax benefits and the ... front end cash flow to the developers." *Id.* at 102637. He concluded that the twenty-year prepayment right "was not a material incentive." *Id.* at 102806. On the other hand, William Dockser, Deputy Assistant Secretary of HUD and FHA Commissioner from 1969 to 1972, testified that "the ability to discuss an exit strategy in 20 years ... was a reason why people would undertake to do these programs and a reason why people would invest in the programs." *Id.* at 500105.

The actual contemporaneous offering memoranda appear to provide more reliable evidence of industry expectations with respect to the general prepayment right (though even those do not consider the possibility of the limited restrictions imposed by the statute). Unfortunately the record contains few examples of such memoranda. But those few that are in the record are revealing. For example, when Skyline View Gardens was syndicated, the owners circulated a prospectus that touted the tax benefits of owning the property. While the prospectus assumed that the restrictions would be lifted after twenty years, it also indicated that the owners placed little value on the right to sell the property (or in the absence of a sale, the right to prepay the mortgage). The schedules demonstrating the tax

benefits were based on the assumption that the partnership would sell the property after twenty-one years for only $1. Other private placement memoranda did not even assume that the property would be sold after twenty years. For example, the private placement memorandum for Gateway Investors only states that the property is subject to a forty-year mortgage without mentioning the prepayment date. These few contemporaneous documents suggest that the owners entered the programs without relying on the ability to prepay after twenty years.

The plaintiffs argue that the prospectus only described the expectations of the limited partners and not the partnership as a whole. This argument is unavailing. Under the securities laws the prospectuses were required to be truthful. *See* 15 U.S.C. § 77*l*(a)(2). In this respect, the prospectuses are particularly reliable. Under the securities laws, the prospectus cannot contain any "untrue statement of a material fact or omit[] ... a material fact." *Id.* This includes misstatements and omissions about the general partner's interest in the properties. *See Currie v. Cayman Res. Corp.*, 835 F.2d 780, 783 (11th Cir.1988) (finding material misrepresentations and omissions under 15 U.S.C. § 77*l*(a)(2) regarding a general partner's interest in a partnership). Accordingly, the prospectuses must contain any material information about both the limited and the general partners' interest in the properties, and are the most reliable indication of the relative importance of the anticipated benefits.

On remand, it is important that the parties provide the Court of Federal Claims with sufficient contemporaneous documents for the court to

determine the actual investment and the expectations of the industry at the time that LIHPRHA was enacted.

CONCLUSION

For the foregoing reasons, we vacate and remand for a new *Penn Central* analysis under the correct legal standard. In view of our clarification of the legal standard, we conclude that on remand the Court of Federal Claims should allow both sides to supplement the record with additional relevant evidence if they wish to do so.

VACATED AND REMANDED.

COSTS

No costs.

NEWMAN, Circuit Judge, dissenting.

I respectfully dissent, for this panel has no authority to revoke our prior decision in *Cienega Gardens v. United States,* 331 F.3d 1319 (Fed.Cir.2003) (*Cienega VIII*). The threshold issues here reviewed were already decided; that decision is the law of this case. The National Housing Act of 1968 led to the program here at issue, where the federal government provided financial incentives to private investors to construct housing to be rented to low-income tenants at rents below the market rate. The investment incentives included guaranteed 40-year mortgages from Fannie Mae at low interest, cost contributions, and other substantial economic subsidies and incentives. In return, the housing owners were limited in the rents they could charge, the income they could earn, and the changes they could make. After twenty years the owner could choose to prepay the subsidized mortgage and remove the property from the arrangement; the property owners had the unencumbered right to do so. An implementing regulation provided:

> 24 C.F.R. § 236.30 (1970). A mortgage indebtedness may be prepaid in full and the Commissioner's controls terminated without the prior consent of the Commissioner where ... the prepayment occurs after the expiration of 20 years from the date of final insurance endorsement of the mortgage ....

As the Court of Federal Claims observed, the right to leave the program after twenty years was an "incentive [that] enabled property owners to provide low-income housing for twenty years, and then terminate the low-income housing restrictions and make a long-term profit by charging market rates for

rentals at the properties." *Cienega Gardens v. United States,* 67 Fed.Cl. 434, 440 (2005) (*Cienega IX*).

As twenty years approached, the owners invoked the right to prepay the mortgage and leave the plan. Congress then enacted the ELIHPA (the Emergency Low Income Housing Preservation Act of 1987), which prohibited leaving the plan, and then in 1990 the LIHPRHA (Low Income Housing Preservation and Resident Homeownership Act), which provided a partially mitigating arrangement after twenty years. The statutes are complex. This and related litigation followed; for these plaintiffs, the first *Cienega Gardens* case was filed in 1994. Prepayment rights were eventually restored by the Housing Opportunity Program Extension Act of 1996 (HOPE). The question of whether a constitutional "taking" occurred during the interim period was fully discussed and finally decided in (*Cienega VIII*). That decision is the law of this case, as to the four "model plaintiffs" whose facts were the premises of the takings analysis, and as to the other similarly situated plaintiffs. The *Cienega VIII* decision and remand to the Court of Federal Claims was with instructions to apply that law to determine whether a taking occurred on the specific facts of each plaintiff, and to assess damages. In the case now on appeal there are eight plaintiffs for eight properties, including Cienega Gardens. The trial court visited the sites, conducted twenty-two days of trial, and assessed damages. *Cienega IX,* 67 Fed.Cl. 434 (2005) is the decision now before us.

This court in *Cienega VIII* resolved that the legislative enactments that forbade removing this privately-owned housing from the low-income low-

rent market after twenty years, and then restored that right, were a temporary taking of property within the purview of constitutional protection. That aspect was reached and decided. This court so recognized in *Independence Park Apartments v. United States,* 449 F.3d 1235 (Fed.Cir.2006):

> [In *Cienega VIII*] we held—based on the factual findings made in *Cienega III*—that the plaintiffs had suffered a "serious financial loss" by being deprived of the opportunity to prepay their mortgages. *See Cienega VIII,* 331 F.3d at 1340-45. Based on our analysis of the *Penn Central* factors and the extensive record already developed in the case, we ruled in favor of the plaintiffs on their regulatory takings claims.

Id. at 1239-40.

In *Cienega VIII* this court reviewed the "Use Agreements" that were made available by the LIHPRHA, and explored the various mechanisms whereby owners responded to the legislative changes until Congress reversed itself via the legislation enacted in HOPE. The remand to the Court of Federal Claims was with instructions to consider these individual differences and assess damages accordingly. This court ruled that the prepayment right was "the critical inducement" to enter the program, and that "they would not have participated in the programs otherwise." *Cienega VIII,* 331 F.3d at 1334, 1348. Those issues are closed; these rulings bind this panel, as they bound the Court of Federal Claims in *Cienega IX.* After thirteen years of litigation, the remaining issue is the application of *Cienega VIII* and the assessment of damages; this panel has no authority to revoke *Cienega VIII.*

My colleagues acknowledge that this court in *Cienega VIII* ruled that "the four model plaintiffs had suffered a compensable temporary regulatory taking," maj. op. at 12, but state that this court acted "on a partial record and limited arguments made by the government," apparently impeaching the parties, the trial court, and ourselves. This is as unwarranted as it is incorrect. In *Independence Park Apartments,* 449 F.3d at 1240, another panel of this court remarked on "the extensive record already developed in the [*Cienega*] case." If there indeed were inadequate arguments by the government and an incomplete record at trial, the concern should have been raised by the panel in that appeal, not four years later when the trial court has acted on and fulfilled the remand instructions, conducted lengthy proceedings, and completed a thorough application of this court's decision in accordance with its terms. *See Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709, 714, 106 S.Ct. 1527, 89 L.Ed.2d 739 (1986) (if the appellate court is dissatisfied with the adequacy of the record and is unable to reach a proper resolution of the legal question, the proper course is to remand to the trial court). Review of the eight *Cienega* cases makes clear that the record and presentation in *Cienega VIII* cannot be discarded as "partial" and "limited," for they were thorough and complete, as well as built on the seven earlier *Cienega* trials and decisions.

On this appeal, the government repeats the arguments it presented in *Cienega VIII,* shifting its emphasis to the argument that the congressional goal of protecting low-income tenants served an "important public interest." In *Cienega VIII* this court agreed: "Unquestionably, Congress acted for a

public purpose (to benefit a certain group of people in need of low-cost housing), but just as clearly, the expense was placed disproportionately on a few private property owners." 331 F.3d at 1338. This court explored whether this was "the kind of expense-shifting to a few persons [that] amounts to a taking," *id.* at 1338-39, and applied the principles of *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) that the "strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change," *id.* at 416. As reiterated in *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005), "the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose." *Id.* at 543. 125 S.Ct. 2074.

The Constitution assures that when the government changes its obligations to private entities with which it has entered into contractual and other specific relationships, the government is as responsible for its direct violation of those relationships as would be any private person. *See Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607-08, 120 S.Ct. 2423, 147 L.Ed.2d 528 (2000) (the United States is bound by the same principles of contract law as in contracts between private persons). Legislative abrogation of property rights, albeit for public purpose, is tolerated because the Constitution assures that the contracting party is not required to bear the burdens of the public as a whole. In *United States v. Winstar,* 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996) the Court explained: "Just as we have long recognized that the Constitution 'bar[s]

Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,' so we must reject the suggestion that the Government may simply shift costs of legislation onto its contractual partners who are adversely affected by the change in the law, when the Government has assumed the risk of such change." *Id.* at 883, 116 S.Ct. 2432 (quoting *Dolan v. City of Tigard,* 512 U.S. 374, 384, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994)).

The issues on this appeal are limited to the application by the Court of Federal Claims of the remand instructions of *Cienega VIII.* Instead, this court proposes that the trial court redecide the basic question of whether a taking occurred at all.[1] No new arguments have been presented, nor any previously unavailable factual information, nor any other basis for reopening what is closed. It is singularly unfair to these plaintiffs to require them to start again, after thirteen years of judicial process.

The issue of this appeal, the appropriate measure of damages, is barely touched. The trial court received extensive briefing and argument and evidence, including expert testimony from all sides. The court gave weight to the partial mitigation by those owners who accepted the "Use Agreements," and evaluated the issues of the owners who sold their properties while the law was in effect. A serious flaw in the majority's analysis is its blurring of the distinction between liability and damages,

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[1] The court is not here acting *en banc;* we simply consolidated the two appeals and enlarged the panel. *En banc* action is required to overturn prior final decisions.

resulting in its skewed approach to the takings analysis. The panel majority's new requirement that the owners must prove that the right to leave the program after twenty years was "the primary incentive" for their initial participation in the program is contrary to all of the rules of evaluating integrated contractual arrangements, for each provision and obligation is deemed significant to the whole. Whatever weight a party may have given to each of the complex restrictions and benefits, this absolute prepayment right was included in all of the arrangements. The prepayment right has been demonstrated, by the experience of this litigation, to be of large economic significance. The prepayment right was included in all of the relevant documents and prospectuses, as well as in the authorizing legislation and regulations. It is not disputed that the removal of this condition spawned this litigation.

My colleagues apply another incorrect premise, for the value of property is measured when it is taken. *See First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* 482 U.S. 304, 320, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) ("the valuation of property which has been taken must be calculated as of the time of the taking"); *Almota Farmers Elevator & Warehouse Co. v. United States.,* 409 U.S. 470, 474, 93 S.Ct. 791, 35 L.Ed.2d 1 (1972) ("the owner is entitled to the fair market value of his property at the time of the taking.") We need not speculate whether the government would have designed a different arrangement in 1968 had the future housing situation been foreseen, or what variation in incentives would have been needed to obtain private participation; the panel majority errs in suggesting that because some other terms might

have obtained the required low-rent housing, those other terms now determine the economic consequences of legislative annulment of the terms that were actually put into place.

The creative theories propounded by my colleagues for redetermining whether a taking occurred ignore the law of this case, as well as the constitutional authority that holds the government to its obligations. I must, respectfully, dissent.

U.S. Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Public Law No. 100-242
101 Stat. 1815
Feb. 5, 1988

* * *

TITLE II—PRESERVATION OF LOW INCOME HOUSING

Subtitle A—General Provisions

SEC. 201. SHORT TITLE.

This title may be cited as the "Emergency Low Income Housing Preservation Act of 1987".

SEC. 202. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds that—

(1) in the next 15 years, more than 330,000 low income housing units insured or assisted under sections 221(d)(3) and 236 of the National Housing Act could be lost as a result of the termination of low income affordability restrictions;

(2) in the next decade, more than 465,000 low income housing units produced with assistance under section 8 of the United States Housing Act of 1937 could be lost as a result of the expiration of the rental assistance contracts;

(3) some 150,000 units of rural low income housing financed under section 515 of the Housing Act of 1949 are threatened with loss as a result of the prepayment of mortgages by owners;

(4) the loss of this privately owned and federally assisted housing, which would occur in a period of sharply rising rents on unassisted housing and extremely low production of additional low rent housing, would inflict unacceptable harm on current tenants and would precipitate a grave national crisis in the supply of low income housing that was neither anticipated nor intended when contracts for these units were entered into;

(5) the loss of this affordable housing, to encourage the production of which the public has provided substantial benefits over past years, would irreparably damage hard-won progress toward such important and long-established national objectives as—

(A) providing a more adequate supply of decent, safe, and sanitary housing that is affordable to low income Americans;

(B) increasing the supply of housing affordable to low income Americans that is accessible to employment opportunities; and

(C) expanding housing opportunities for all Americans, particularly members of disadvantaged minorities;

(6) the provision of an adequate supply of low income housing has depended and will continue to depend upon a strong, long-term partnership between the public and private sectors that accommodates a fair return on investment;

(7) recent reductions in Federal housing assistance and tax benefits related to low income housing have increased the incentives for private

industry to withdraw from the production and management of low income housing;

(8) efforts to retain this housing must take account of specific financial and market conditions that differ markedly from project to project;

(9) a major review of alternative responses to this threatened loss of affordable housing is now being undertaken by numerous private sector task forces as well as State and local oganizations; and

(10) until the Congress can act on recommendations that will emerge from this review, interim measures are needed to avoid the irreplaceable loss of low income housing and irrevocable displacement of current tenants.

(b) PURPOSE.—It is the purpose of this title—

(1) to preserve and retain to the maximum extent practicable as housing affordable to low income families or persons those privately owned dwelling units that were produced for such purpose with Federal assistance;

(2) to minimize the involuntary displacement of tenants currently residing in such housing; and

(3) to continue the partnership between all levels of government and the private sector in the production and operation of housing that is affordable to low income Americans.

* * *

Subtitle B—Prepayment of Mortgages Insured Under National Housing Act

SEC. 221. GENERAL PREPAYMENT LIMITATION.

(a) PRIOR APPROVAL OF PLAN OF ACTION.—An owner of eligible low income housing may prepay, and a mortgagee may accept prepayment of, a mortgage on such housing only in accordance with a plan of action approved by the Secretary of Housing and Urban Development under this subtitle.

(b) ALTERNATIVE PREPAYMENT MORATORIUM.—In the event any court of the United States or any State invalidates the requirements established in this subtitle, an owner of eligible low income housing located in the geographic area subject to the jurisdiction of such court may not prepay, and a mortgagee may not accept prepayment of, a mortgage on such housing during the 2-year period following the date of such invalidation.

SEC. 222. NOTICE OF INTENT.

An owner of eligible low income housing seeking to initiate prepayment or other changes in the status or terms of the mortgage or regulatory agreement shall file with the Secretary a notice of the intent of the owner in such form and manner as the Secretary shall prescribe. The owner shall simultaneously file the notice or intent with any appropriate State or local government agency for the jurisdiction within which the housing is located.

SEC. 223. PLAN OF ACTION.

(a) PREPARATION AND SUBMISSION.—Upon receipt of a notice of intent, the Secretary shall provide the owner with such information as the owner needs to prepare a plan of action, which information shall include a description of the Federal incentives

authorized under this title. The owner shall submit the plan of action to the Secretary in such form and manner as the Secretary shall prescribe. The owner may simultaneously submit the plan of action to any appropriate State or local government agency for the jurisdiction within which the housing is located, which agency shall, in reviewing the plan, consult with representatives of the tenants of the housing.

(b) CONTENTS.—The plan of action shall include—

(1) a description of any proposed changes in the status or terms of the mortgage or regulatory agreement, which may include a request for incentives to extend the low income use of the housing;

(2) a description of any assistance that could be provided by State or local government agencies, as determined by prior consultation between the owner and any appropriate State or local agencies;

(3) a description of any proposed changes in the low income affordability restrictions;

(4) a description of any change in ownership that is related to prepayment;

(5) an assessment of the effect of the proposed changes on existing tenants;

(6) a statement of the effect of the proposed changes on the supply of housing affordable to lower and very low income families or persons in the community within which the housing is located and in the area that the housing could reasonably be expected to serve; and

(7) any other information that the Secretary determines is necessary to achieve the purposes of this title.

(c) REVISIONS.—The owner may from time to time revise and amend the plan of action as may be necessary to obtain approval of the plan under this subtitle.

SEC. 224. INCENTIVES TO EXTEND LOW INCOME USE.

(a) AGREEMENTS BY SECRETARY.—After receiving a plan of action from an owner of eligible low income housing, the Secretary may enter into such agreements as are necessary to satisfy the criteria for approval under section 225.

(b) PERMISSIBLE INCENTIVES.—Such agreements may include one or more of the following incentives that the Secretary, after taking into account local market conditions, determines to be necessary to achieve the purposes of this title:

(1) An increase in the allowable distribution or other measures to increase the rate of return on investment.

(2) Revisions to the method of calculating equity.

(3) Increased access to residual receipts accounts or excess replacement reserves.

(4) Provision of insurance for a second mortgage under section 241(f) of the National Housing Act.

(5) An increase in the rents permitted under an existing contract under section 8 of the United States Housing Act of 1937, or (subject to the availability of amounts provided in appropriation Acts) additional assistance under

such section 8 or an extension of any project-based assistance attached to the housing.

(6) Financing of capital improvements under section 201 of the Housing and Community Development Amendments of 1978.

(7) Other actions, authorized in other provisions of law, to facilitate a transfer or sale of the project to a qualified nonprofit organization, limited equity tenant cooperative, public agency, or other entity acceptable to the Secretary.

(8) Other incentives authorized in law.

SEC. 225. CRITERIA FOR APPROVAL OF PLAN OF ACTION.

(a) PLAN OF ACTION INVOLVING TERMINATION OF LOW INCOME AFFORDABILITY RESTRICTIONS.—The Secretary may approve a plan of action that involves termination of the low income affordability restrictions only upon a written finding that—

(1) implementation of the plan of action will not materially increase economic hardship for current tenants or involuntarily displace current tenants (except for good cause) where comparable and affordable housing is not readily available; and

(2)(A) the supply of vacant, comparable housing is sufficient to ensure that such prepayment will not materially affect—

(i) the availability of decent, safe, and sanitary housing affordable to lower income and very low-income families or persons in the area that the housing could reasonably be expected to serve;

(ii) the ability of lower income and very low-income families or persons to find affordable, decent, safe, and sanitary housing near employment opportunities; or

(iii) the housing opportunities of minorities in the community within which the housing is located; or

(B) the plan has been approved by the appropriate State agency and any appropriate local government agency for the jurisdiction within which the housing is located as being in accordance with a State strategy approved by the Secretary under section 226.

(b) PLAN OF ACTION INCLUDING INCENTIVES.—The Secretary may approve a plan of action that includes incentives only upon finding that—

(1) the package of incentives is necessary to provide a fair return on the investment of the owner;

(2) due diligence has been given to ensuring that the package of incentives is, for the Federal Government, the least costly alternative that is consistent with the full achievement of the purposes of this title; and

(3) binding commitments have been made to ensure that—

(A) the housing will be retained as housing affordable for very low-income families or persons, lower income families or persons, and moderate income families or persons for the remaining term of the mortgage;

(B) throughout such period, adequate expenditures will be made for maintenance and operation of the housing;

(C) current tenants shall not be involuntarily displaced (except for good cause);

(D) any increase in rent contributions for current tenants shall be to a level that does not exceed 30 percent of the adjusted income of the tenant or the fair market rent for comparable housing under section 8(b) of the United States Housing Act of 1937, whichever is lower;

(E)(i) any resulting increase in rents for current tenants (except for increases made necessary by increased operating costs)—

(I) shall be phased in equally over a period of not less than 3 years, if such increase is 30 percent or more; and

(II) shall be limited to not more than 10 percent per year if such increase is more than 10 percent but less than 30 percent; and

(ii) assistance under section 8 of the United States Housing Act of 1937 shall be provided if necessary to mitigate any adverse affect on current income eligible tenants; and

(F)(i) rents for units becoming available to new tenants shall be at levels approved by the Secretary that will ensure, to the extent practicable, that the units will be available and affordable to the same proportions of very low-income families or persons, lower

income families or persons, and moderate income families or persons (including families or persons whose incomes are 95 percent or more of area median income) as resided in the housing as of January 1, 1987; and

(ii) in approving rents under this paragraph, the Secretary shall take into account any additional incentives provided under this subtitle and shall make provision for such annual rent adjustments as may be made necessary by future reasonable increases in operating costs.

* * *

SEC. 233. DEFINITIONS.

For purposes of this subtitle:

(1) The term "eligible low income housing" means any housing financed by a loan or mortgage—

(A) that is—

(i) insured or held by the Secretary under section 221(d)(3) of the National Housing Act and assisted under section 101 of the Housing and Urban Development Act of 1965 or section 8 of the United States Housing Act of 1937;

(ii) insured or held by the Secretary and bears interest at a rate determined under the proviso of section 221(d)(5) of the National Housing Act;

(iii) insured, assisted, or held by the Secretary under section 236 of the National Housing Act; or

(iv) held by the Secretary and formerly insured under a program referred to in clause (i), (ii), or (iii); and

(B) that, under regulation or contract in effect before the date of the enactment of this Act, is or will be within 1 year become eligible for prepayment without prior approval of the Secretary.

(2) The term "low income affordability restrictions" means limits imposed by regulation or regulatory agreement on tenant rents, rent contributions, or income eligibility in eligible low income housing.

(3) The terms "lower income families or persons" and "very low-income families or persons" mean families or persons whose incomes do not exceed the respective levels established for lower income families and very low-income families under section 3(b)(2) of the United States Housing Act of 1937.

(4) The term "moderate income families or persons" means families or persons whose incomes are between 80 percent and 95 percent of median income for the area, as determined by the Secretary with adjustments for smaller and larger families.

(5) The term "owner" means the current or subsequent owner or owners of eligible low income housing.

(6) The term "Secretary" means the Secretary of Housing and Urban Development.

(7) The term "termination of low income affordability restrictions" means any elimination or relaxation of low income affordability restrictions (other than those permitted under an approved plan of action under section 225(b)).

SEC. 234. REGULATIONS.

The Secretary shall issue final regulations to carry out this subtitle not later than 60 days after the date of the enactment of this Act. The Secretary shall provide for the regulations to take effect not later than 45 days after the date on which the regulations are issued.

SEC. 235. EFFECTIVE DATE.

The requirements of this subtitle shall apply to any project that is eligible low income housing on or after November 1, 1987.

* * *

Public Law No. 101-625
104 Stat. 4079
Nov. 28, 1990

* * *

TITLE VI—PRESERVATION OF AFFORDABLE RENTAL HOUSING

Subtitle A—Prepayment of Mortgages Insured Under National Housing Act

SEC. 601. PREPAYMENT OF MORTGAGES.

(a) IN GENERAL.—Subtitles A and B of the Emergency Low Income Housing Preservation Act of 1987 (12 U.S.C. 1715*l* note) are amended to read as follows:

"Subtitle A—Short Title

"SEC. 201. SHORT TITLE.

"This title may be cited as the 'Low-Income Housing Preservation and Resident Homeownership Act of 1990'.

"Subtitle B—Prepayment of Mortgages Insured Under National Housing Act

"SEC. 211.—GENERAL PREPAYMENT LIMITATION.

"(a) PREPAYMENT AND TERMINATION.—An owner of eligible low-income housing may prepay, and a mortgagee may accept prepayment of, a mortgage on such housing only in accordance with a plan of action approved by the Secretary under this subtitle or in accordance with section 224. An insurance contract

with respect to eligible low-income housing may be terminated pursuant to section 229 of the National Housing Act only in accordance with a plan of action approved by the Secretary under this subtitle or in accordance with section 224.

"(b) FORECLOSURE.—A mortgagee may foreclose the mortgage on, or acquire by deed in lieu of foreclosure, any eligible low-income housing project only if the mortgagee also conveys title to the project to the Secretary in connection with a claim for insurance benefits.

"(c) EFFECT OF UNAUTHORIZED PREPAYMENT.—Any prepayment of a mortgage on eligible low-income housing or termination of the mortgage insurance on such housing not in compliance with the provisions of this subtitle shall be null and void and any low-income affordability restrictions on the housing shall continue to apply to the housing.

"SEC. 212. NOTICE OF INTENT.

"(a) FILING WITH THE SECRETARY.—An owner of eligible low-income housing that intends to terminate the low-income affordability restrictions through prepayment or voluntary termination in accordance with section 218, extend the low-income affordability restrictions of the housing in accordance with section 219, or transfer the housing to a qualified purchaser in accordance with section 220, shall file with the Secretary a notice indicating such intent in the form and manner as the Secretary shall prescribe.

"(b) FILING WITH THE STATE OR LOCAL GOVERNMENT, TENANTS, AND MORTGAGEE.—The owner, upon filing a notice of intent under this

section, shall simultaneously file the notice of intent with the chief executive officer of the appropriate State or local government for the jurisdiction within which the housing is located and with the mortgagee, and shall inform the tenants of the housing of the filing.

"(c) INELIGIBILITY FOR FILING.—An owner shall not be eligible to file a notice of intent under this section if the mortgage covering the housing—

"(1) falls into default on or after the date of the enactment of the Cranston-Gonzalez National Affordable Housing Act; or

"(2)(A) fell into default before, but is current as of, such date; and

"(B) the owner does not agree to recompense the appropriate Insurance Fund, in the amount the Secretary determines appropriate, for any losses sustained by the Fund as a result of any work-out or other arrangement agreed to by the Secretary and the owner with respect to the defaulted mortgage.

The Secretary shall carry out this subsection in a manner consistent with the provisions of section 203 of the Housing and Community Development Amendments of 1978.

"SEC. 213. APPRAISAL AND PRESERVATION VALUE OF ELIGIBLE LOW-INCOME HOUSING.

"(a) APPRAISAL.—Upon receiving notice of intent regarding an eligible low-income housing project indicating an intent to extend the low-income affordability restrictions under section 219 or

transfer the housing under section 220, the Secretary shall provide for determination of the preservation value of the housing, as follows:

"(1) APPRAISERS.—The preservation value shall be determined by 2 independent appraisers, one of whom shall be selected by the Secretary and one of whom shall be selected by the owner. The appraisals shall be conducted not later than 4 months after filing the notice of intent under section 212, and the owner shall submit to the Secretary the appraisal made by the owner's selected appraiser not later than 90 days after receipt of the notice under paragraph (2). If the 2 appraisers fail to agree on the preservation value, and the Secretary and the owner also fail to agree on the preservation value, the Secretary and the owner shall jointly select and jointly compensate a third appraiser, whose appraisal shall be binding on the parties.

"(2) NOTICE.—Not later than 30 days after the filing of a notice of intent to seek incentives under section 219 or transfer the property under section 220, the Secretary shall provide written notice to the owner filing the notice of intent of—

"(A) the need for the owner to acquire an appraisal of the property under paragraph (1);

"(B) the rules and guidelines for such appraisals;

"(C) the filing deadline for submission of the appraisal under paragraph (1);

"(D) the need for an appraiser retained by the Secretary to inspect the housing and project financial records; and

"(E) any delegation to the appropriate State agency by the Secretary of responsibilities regarding the appraisal.

"(3) TIMELINESS.—The Secretary may approve a plan of action to receive incentives under section 219 or 220 only based upon an appraisal conducted in accordance with this subsection that is not more than 30 months old.

"(b) PRESERVATION VALUE.—For purposes of this subtitle, the preservation value of eligible low-income housing appraised under this section shall be—

"(1) for purposes of extending the low-income affordability restrictions and receiving incentives under section 219, the fair market value of the property based on the highest and best use of the property as residential rental housing; and

"(2) for purposes of transferring the property under section 220 or 221, the fair market value of the housing based on the highest and best use of the property.

"(c) GUIDELINES.—The Secretary shall provide written guidelines for appraisals of preservation value, which shall assume repayment of the existing federally assisted mortgage, termination of the existing low-income affordability restrictions, and costs of compliance with any State or local laws of general applicability. The guidelines may permit reliance upon assessments of rehabilitation needs

and other conversion costs determined by an appropriate State agency, as determined by the Secretary. The guidelines shall instruct the appraiser to use the greater of actual project operating expenses at the time of the appraisal (based on the average of the actual project operating expenses during the preceding 3 years) or projected operating expenses after conversion in determining preservation value. The guidelines established by the Secretary shall not be inconsistent with customary appraisal standards. The guidelines shall also meet the following requirements:

"(1) RESIDENTIAL RENTAL VALUE.—In the case of preservation value determined under subsection (b)(1), the guidelines shall assume conversion of the housing to market-rate rental housing and shall establish methods for (A) determining rehabilitation expenditures that would be necessary to bring the housing up to quality standards required to attract and sustain a market rate tenancy upon conversion, and (B) assessing other costs that the owner could reasonably be expected to incur if the owner converted the property to market-rate multifamily rental housing.

"(2) HIGHEST AND BEST USE VALUE.—In the case of preservation value determined under subsection (b)(2), the guidelines shall assume conversion of the housing to highest and best use for the property and shall establish methods for (A) determining any rehabilitation expenditures that would be necessary to convert the housing to such use, and (B) assessing other costs that

the owner could reasonably be expected to incur if the owner converted the property to its highest and best use.

"SEC. 214. ANNUAL AUTHORIZED RETURN AND PRESERVATION RENTS.

"(a) ANNUAL AUTHORIZED RETURN.—Pursuant to an appraisal under section 213, the Secretary shall determine the annual authorized return on the appraised housing, which shall be equal to 8 percent of the preservation equity (as such term is defined in section 229(8)).

"(b) PRESERVATION RENTS.—The Secretary shall also determine the aggregate preservation rents under this subsection for each project appraised under section 213. The aggregate preservation rents shall be used solely for the purposes of comparison with Federal cost limits under section 215. Actual rents received by an owner (or a qualified purchaser) shall be determined pursuant to section 219, 220, or 221. The aggregate preservation rents shall be established as follows:

"(1) EXTENSION OF AFFORDABILITY LIMITS.—The aggregate preservation rent for purposes of receiving incentives pursuant to extension of the low-income affordability restrictions under section 219 shall be the gross potential income for the project, determined by the Secretary, that would be required to support the following costs:

"(A) The annual authorized return determined under subsection (a).

"(B) Debt service on any rehabilitation loan for the housing.

"(C) Debt service on the federally-assisted mortgage for the housing.

"(D) Project operating expenses.

"(E) Adequate reserves.

"(2) SALE.—The aggregate preservation rent for purposes of receiving incentives pursuant to sale under section 220 or 221 shall be the gross income for the project determined by the Secretary, that would be required to support the following costs:

"(A) Debt service on the loan for acquisition of the housing.

"(B) Debt service on any rehabilitation loan for the housing.

"(C) Debt service on the federally-assisted mortgage for the housing.

"(D) Project operating expenses.

"(E) Adequate reserves.

"SEC. 215. FEDERAL COST LIMITS AND LIMITATIONS ON PLANS OF ACTION.

"(a) DETERMINATION OF RELATIONSHIP TO FEDERAL COST LIMITS.—

"(1) INITIAL DETERMINATION.—For each eligible low-income housing project appraised under section 213(a), the Secretary shall determine whether the aggregate preservation rents for the project determined under paragraph (1) or (2) of section 214(b) exceed the amount determined by multiplying 120 percent of the fair market rental (established under section 8(c) of the United States Housing Act of 1937) for the market area in which the housing

is located by the number of dwelling units in the project (according to appropriate unit sizes).

"(2) RELEVANT LOCAL MARKETS.—If the aggregate preservation rents for a project exceeds the amount determined under paragraph (1), the Secretary shall determine whether such aggregate rents exceed the amount determined by multiplying 120 percent of the prevailing rents in the relevant local market area in which the housing is located by the number of units in the project (according to the appropriate unit sizes). A relevant local market area shall be an area geographically smaller than a market area established by the Secretary under section 8(c)(1) of the United States Act of 1937 that is identifiable as a distinct rental market area. The Secretary may rely on the appraisal to determine the relevant local market areas and prevailing rents in such local areas and any other information the Secretary determines is appropriate.

"(3) EFFECT.—For purposes of this subtitle, the aggregate preservation rents shall be considered to exceed the Federal cost limits under this subsection only if the aggregate preservation rents exceed the amount determined under paragraph (1) and the amount determined under paragraph (2).

"(b) LIMITATIONS ON ACTION PURSUANT TO FEDERAL COST LIMITS.—

"(1) HOUSING WITHIN FEDERAL COST LIMITS.—If the aggregate preservation rents for an eligible low-income housing project do not exceed

the Federal cost limit, the owner may not prepay the mortgage on the housing or terminate the insurance contract with respect to the housing, except as permitted under section 224. The owner may—

"(A) file a plan of action under section 217 to receive incentives under section 219; or

"(B) file a second notice of intent under section 216(d) indicating an intention to transfer the housing under section 220 and take actions pursuant to such section.

"(2) HOUSING EXCEEDING FEDERAL COST LIMITS.—If the aggregate preservation rents for an eligible low-income housing project exceed the Federal cost limit, the owner may—

"(A) file a plan of action under section 217 to receive incentives under section 219 if the owner agrees to accept incentives under such sections in an amount that shall not exceed the Federal cost limit;

"(B) file a second notice of intent under section 216(d) indicating an intention to transfer the housing under section 220 and take actions pursuant to such section if the owner agrees to transfer the housing at a price that shall not exceed the Federal cost limit; or

"(C) file a second notice of intent under section 216(d) indicating an intention to prepay the mortgage or voluntarily terminate the insurance, subject to the mandatory sale provisions under section 221.

"SEC. 216. INFORMATION FROM SECRETARY.

"(a) INFORMATION TO OWNERS TERMINATING AFFORDABILITY RESTRICTIONS.—The Secretary shall provide each owner who submits a notice of intent to terminate the low-income affordability restrictions on the housing under section 218 with information under this section not later than 6 months after receipt of the notice of intent. The information shall include a description of the criteria for such termination specified under section 218 and the documentation required to satisfy such criteria.

"(b) INFORMATION TO OWNERS EXTENDING LOW-INCOME AFFORDABILITY RESTRICTIONS.—The Secretary shall provide each owner who submits notice of intent to extend the low-income affordability restrictions on the housing under section 219 or transfer the housing under section 220 to a qualified purchaser with information under this subsection not later than 9 months after receipt of the notice of intent. The information shall include any information necessary for the owner to prepare a plan of action under section 217, including the following:

"(1) PRESERVATION VALUES.—A statement of the preservation value of the housing determined under paragraphs (1) and (2) of section 213(b).

"(2) PRESERVATION RENT.—A statement of the preservation rent for the housing as calculated under section 214(b).

"(3) FEDERAL COST LIMITS.—A statement of the applicable Federal cost limits for the market area (or relevant local market area, if applicable)

in which the housing is located, which shall explain the limitations under sections 219 and 220 of the amount of assistance that the Secretary may provide based on such cost limits.

"(4) FEDERAL COST LIMIT ANALYSIS.—A statement of whether the aggregate preservation rents exceeds the Federal cost limits and a direction to the owner to file a plan of action under section 217 or submit a second notice of intent under section 216(d), whichever is applicable.

"(c) AVAILABILITY TO TENANTS.—The Secretary shall make any information provided to the owner under subsections (a) and (b) available to the tenants of the housing, together with other information relating to the rights and opportunities of the tenants.

"(d) SECOND NOTICE OF INTENT.—

"(1) FILING.—Each owner of eligible low-income housing that elects to transfer housing under section 220 shall submit to the Secretary, in such form and manner as the Secretary prescribes, notice of intent to sell the housing under section 220. To be eligible to prepay the mortgage or voluntarily terminate the insurance contract on the mortgage, an owner of housing for which the preservation rents exceed the Federal cost limits under section 215(b) shall submit to the Secretary notice of such intent. The provisions of sections 221 and 223 shall apply to any owner submitting a notice under the preceding sentence.

"(2) TIMING.—A second notice of intent under this subsection shall be submitted not later than 30 days after receipt of information from the Secretary under this section. If an owner fails to submit such notice within such period, the notice of intent submitted by the owner under section 212 shall be void and ineffective for purposes of this subtitle.

"SEC. 217. PLAN OF ACTION.

"(a) SUBMISSION TO SECRETARY.—

"(1) TIMING.—Not later than 6 months after receipt of the information from the Secretary under section 216 an owner seeking to terminate the low-income affordability restrictions through prepayment of the mortgage or voluntary termination under section 218, or to extend the low-income affordability restriction on the housing under section 219, shall submit a plan of action to the Secretary in such form and manner as the Secretary shall prescribe. Any owner or purchaser seeking a transfer of the housing under section 220 or 221 shall submit a plan of action under this section to the Secretary upon acceptance of a bona fide offer under section 220(b) or (c) or upon making of any bona fide offer under section 221.

"(2) COPIES TO TENANTS.—Each owner submitting a plan of action under this section to the Secretary shall also submit a copy to the tenants of the housing. The owner shall simultaneously submit the plan of action to the office of the chief executive officer of the appropriate State or local government for the

jurisdiction within which the housing is located. An appropriate agency of such State or local government shall review the plan and advise the tenants of the housing of any programs that are available to assist the tenants in carrying out the purposes of this title.

"(3) FAILURE TO SUBMIT.—If the owner does not submit a plan of action to the Secretary within the 6-month period referred to in paragraph (1) (or the applicable longer period), the notice of intent shall be ineffective for purposes of this subtitle and the owner may not submit another notice of intent under section 212 until 6 months after the expiration of such period.

"(b) CONTENTS.—

"(1) TERMINATION OF AFFORDABILITY RESTRICTIONS.—If the plan of action proposes to terminate the low-income affordability restrictions through prepayment or voluntary termination in accordance with section 218, the plan shall include—

"(A) a description of any proposed changes in the status or terms of the mortgage or regulatory agreement;

"(B) a description of any proposed changes in the low-income affordability restrictions;

"(C) a description of any change in ownership that is related to prepayment or voluntary termination;

"(D) an assessment of the effect of the proposed changes on existing tenants;

"(E) an analysis of the effect of the proposed changes on the supply of housing affordable to low- and very low-income families or persons in the community within which the housing is located and in the area that the housing could reasonably be expected to serve; and

"(F) any other information that the Secretary determines is necessary to achieve the purposes of this title.

"(2) EXTENSION OF AFFORDABILITY RESTRICTIONS.—If the plan of action proposes to extend the low-income affordability restrictions of the housing in accordance with section 219 or transfer the housing to a qualified purchaser in accordance with section 220, the plan shall include—

"(A) a description of any proposed changes in the status or terms of the mortgage or regulatory agreement;

"(B) a description of the Federal incentives requested (including cash flow projections), and analyses of how the owner will address any physical or financial deficiencies and maintain the low-income affordability restrictions of the housing;

"(C) a description of any assistance from State or local government agencies, including low-income housing tax credits, that have been offered to the owner or purchaser or for which the owner or purchaser has applied or intends to apply;

"(D) a description of any transfer of the property, including the identity of the transferee and a copy of any documents of sale; and

"(E) any other information that the Secretary determines is necessary to achieve the purposes of this title.

"(c) REVISIONS.—An owner may from time to time revise and amend the plan of action as may be necessary to obtain approval of the plan under this subtitle. The owner shall submit any revision to the Secretary and to the tenants of the housing.

"SEC. 218. PREPAYMENT AND VOLUNTARY TERMINATION.

"(a) APPROVAL.—The Secretary may approve a plan of action that provides for termination of the low-income affordability restrictions through prepayment of the mortgage or voluntary termination of the mortgage insurance contract only upon a written finding that—

"(1) implementation of the plan of action will not—

"(A) materially increase economic hardship for current tenants, and will not in any event result in (i) a monthly rental payment by any current tenant that exceeds 30 percent of the monthly adjusted income of the tenant or an increase in the monthly rental payment in any year that exceeds 10 percent (whichever is lower), or (ii) in the case of a current tenant who already pays more than such percentage, an increase in the monthly rental payment in any year that

exceeds the increase in the Consumer Price Index or 10 percent (whichever is lower); or

"(B) involuntarily displace current tenants (except for good cause) where comparable and affordable housing is not readily available determined without regard to the availability of Federal housing assistance that would address any such hardship or involuntary displacement; and

"(2) the supply of vacant, comparable housing is sufficient to ensure that such prepayment will not materially affect—

"(A) the availability of decent, safe, and sanitary housing affordable to low-income and very low-income families or persons in the area that the housing could reasonably be expected to serve;

"(B) the ability of low-income and very low-income families or persons to find affordable, decent, safe, and sanitary housing near employment opportunities; or

"(C) the housing opportunities of minorities in the community within which the housing is located.

"(b) DISAPPROVAL.—If the Secretary determines a plan of action to prepay a mortgage or terminate an insurance contract fails to meet the requirements of subsection (a), the Secretary shall disapprove the plan, the notice of intent filed under section 212 by such owner shall not be effective for purposes of this subtitle, and the owner may, in order to receive incentives under this subtitle, file a new notice of intent under such section.

"SEC. 219. INCENTIVES TO EXTEND LOW-INCOME USE.

"(a) AGREEMENTS BY SECRETARY.—After approving a plan of action from an owner of eligible low-income housing that includes the owner's plan to extend the low-income affordability restrictions of the housing, the Secretary shall, subject to the availability of appropriations for such purpose, enter into such agreements as are necessary to enable the owner to receive the annual authorized return for the housing determined under section 214(a), pay debt service on the federally-assisted mortgage covering the housing, pay debt service on any loan for rehabilitation of the housing, and meet project operating expenses and establish adequate reserves. The Secretary shall take into account the Federal cost limits under section 215(a) for the housing when providing incentives under subsections (b)(2) and (3) of this section.

"(b) PERMISSIBLE INCENTIVES.—Such agreements may include one or more of the following incentives:

"(1) Increased access to residual receipts accounts.

"(2) Subject to the availability of amounts provided in appropriations Acts—

"(A) an increase in the rents permitted under an existing contract under section 8 of the United States Housing Act of 1937, or

"(B) additional assistance under section 8 or an extension of any project-based assistance attached to the housing; and

"(3) An increase in the rents on units occupied by current tenants as permitted under section 222.

"(4) Financing of capital improvements under section 201 of the Housing and Community Development Amendments of 1978.

"(5) Financing of capital improvements through provision of insurance for a second mortgage under section 241 of the National Housing Act.

"(6) In the case of housing defined in section 229(1)(A)(iii), redirection of the Interest Reduction Payment subsidies to a second mortgage.

"(7) Access by the owner to a portion of the preservation equity in the housing through provision of insurance for a second mortgage loan insured under section 241(f) of the National Housing Act or a non-insured mortgage loan approved by the Secretary and the mortgagee.

"(8) Other incentives authorized in law.

With respect to any housing with a mortgage insured or otherwise assisted pursuant to section 236 of the National Housing Act, the provisions of subsections (f) and (g) of section 236 of such Act notwithstanding, the fair market rental charge for each unit in such housing may be increased in accordance with this subsection, but the owner shall pay to the Secretary all rental charges collected in excess of the basic rental charges, in an amount not greater than the fair market rental charges as such charges would have been established under section

236(f) of such Act absent the requirements of this paragraph.

"SEC. 220. INCENTIVES FOR TRANSFER TO QUALIFIED PURCHASERS.

"(a) IN GENERAL.—With respect to any eligible low-income housing for which an owner has submitted a second notice of intent under section 216(d) to transfer the housing to a qualified purchaser, the owner shall offer the housing for transfer to qualified purchasers as provided in this section. The Secretary shall issue regulations describing the means by which potential qualified purchasers shall be notified of the availability of the housing for sale. The Secretary shall take into account the Federal cost limits under section 215(a) for the housing when providing incentives under section 219(b)(2) and (b)(3) (pursuant to subsection (d)(3) of this section).

"(b) RIGHT OF FIRST OFFER TO PRIORITY PURCHASERS.—

"(1) NEGOTIATION PERIOD.—For the 12-month period beginning on the receipt by the Secretary of a second notice of intent under section 216(d) with respect to such housing, the owner may offer to sell and negotiate a sale of the housing only with priority purchasers. The negotiated sale price may not exceed the preservation value of the housing determined under section 213(b)(2). The owner or the purchaser shall submit a plan of action under section 217 for any sale under this subsection, which shall include any request for assistance under this section,

upon the acceptance of any bona fide offer meeting the requirements of this paragraph.

"(2) EXPRESSION OF INTEREST.—During such period, priority purchasers may submit written notice to the Secretary stating their interest in acquiring the housing. Such notice shall be made in the form and include such information as the Secretary may prescribe.

"(3) INFORMATION.—Within 30 days of receipt of an expression of interest by a priority purchaser, the Secretary shall provide such purchaser with information on the assistance available from the Federal Government to facilitate a transfer and the owner shall provide appropriate information on the housing, as determined by the Secretary.

"(c) RIGHT OF REFUSAL FOR OTHER QUALIFIED PURCHASERS.—If no bona fide offer to purchase any eligible low-income housing subject to this section that meets the requirements of subsection (b) is made and accepted during the period under such subsection, during the 3-month period beginning upon the expiration of the 12-month period under subsection (b)(1), the owner of the housing may offer to sell and may sell the housing only to qualified purchasers. The negotiated sale price may not exceed the preservation value of the housing determined under section 213(b)(2). The owner or purchaser shall submit a plan of action under section 217 for any sale under this subsection, which shall include any request for assistance under this section, upon the acceptance of any bona fide offer meeting the requirements of this paragraph.

"(d) ASSISTANCE.—

"(1) APPROVAL.—If the qualified purchaser is a resident council, the Secretary may not approve a plan of action for assistance under this section unless the council's proposed resident homeownership program meets the requirements under section 226. For all other qualified purchasers, the Secretary may not approve the plan unless the Secretary finds that the criteria for approval under section 222 have been satisfied.

"(2) AMOUNT.—Subject to the availability of amounts approved in appropriations Acts, the Secretary shall, for approvable plans of action, provide assistance sufficient to enable qualified purchasers to—

"(A) acquire the eligible low-income housing from the current owner for a purchase price not greater than the preservation equity of the housing;

"(B) pay the debt service on the federally-assisted mortgage covering the housing;

"(C) pay the debt service on any loan for the rehabilitation of the housing;

"(D) meet project operating expenses and establish adequate reserves for the housing;

"(E) receive an adequate return (as determined by the Secretary) on any actual cash investment made to acquire the project;

"(F) in the case of a priority purchaser, receive an adequate reimbursement for transaction expenses relating to acquisition

of the housing, subject to approval by the Secretary; and

"(G) in the case of an approved resident homeownership program, cover the costs of training for the resident council, homeownership counseling and training, the fees for the nonprofit entity or public agency working with the resident council and costs related to relocation of tenants who elect to move.

"(3) INCENTIVES.—

"(A) IN GENERAL.—For all qualified purchasers of housing under this subsection, the Secretary may provide assistance for an approved plan of action in the form of 1 or more of the incentives authorized under section 219(b), except that any residual receipts for the housing transferred to the selling owner shall be deducted from the sale price of the housing under subsection (b) or (c) and the incentive under such section 219(b)(7) may include an acquisition loan under section 241(f) of the National Housing Act.

"(B) PRIORITY PURCHASERS.—Where the qualified purchaser is a priority purchaser, the Secretary may provide assistance for an approved plan of action (in the form of a grant) for each unit in the housing in an amount, as determined by the Secretary, that does not exceed the present value of the total of the projected published fair market rentals for existing housing (established by

the Secretary under section 8(c) of the United States Housing Act of 1937) for the next 10 years (or such longer period if additional assistance is necessary to cover the costs referred to in paragraph (2)).

* * *

"SEC. 222. CRITERIA FOR APPROVAL OF PLAN OF ACTION INVOLVING INCENTIVES.

"(a) IN GENERAL.—The Secretary may approve a plan of action for extension of the low-income affordability restrictions on any eligible low-income housing or transfer the housing to a qualified purchaser (other than a resident council) only upon finding that—

"(1) due diligence has been given to ensuring that the package of incentives is, for the Federal Government, the least costly alternative that is consistent with the full achievement of the purposes of this title;

"(2) binding commitments have been made to ensure that—

"(A) the housing will be retained as housing affordable for very low-income families or persons, low income families or persons, and moderate-income families or persons for the remaining useful life of such housing (as determined under subsection (c));

"(B) throughout such period, adequate expenditures will be made for maintenance

and operation of the housing and that the project meets housing standards established by the Secretary under subsection (d), as determined by inspections conducted under such subsection by the Secretary;

"(C) current tenants will not be involuntarily displaced (except for good cause);

"(D) any increase in rent contributions for current tenants will be to a level that does not exceed 30 percent of the adjusted income of the tenant or the published existing fair market rent for comparable housing established under section 8(c) of the United States Housing Act of 1937, whichever is lower, except that the rent contributions of any tenants occupying the housing at the time of any increase may not be reduced by reason of this subparagraph (except with respect to tenants receiving section 8 assistance in accordance with subparagraph (E)(ii) of this paragraph);

"(E)(i) any resulting increase in rents for current tenants (except for increases made necessary by increased operating costs)—

"(I) shall be phased in equally over a period of not less than 3 years, if such increase is 30 percent or more; and

"(II) shall be limited to not more than 10 percent per year if such increase is more than 10 percent but less than 30 percent; and

"(ii) assistance under section 8 of the United States Housing Act of 1937 shall be provided, to the extent available under appropriation Acts, if necessary to mitigate any adverse effect on current income-eligible very low-and low-income tenants; and

"(F)(i) rents for units becoming available to new tenants shall be at levels approved by the Secretary that will ensure, to the extent practicable, that the units will be available and affordable to the same proportions of very low-income families or persons, low-income families or persons, and moderate-income families or persons (including families or persons whose incomes are 95 percent or more of area median income) as resided in the housing as of January 1, 1987 (based on the area median income limits established by the Secretary in February 1987), or the date the plan of action is approved, whichever date results in the highest proportion of very low-income families, except that this limitation shall not prohibit a higher proportion of very low-income families from occupying the housing; and

"(ii) in approving rents under this paragraph, the Secretary shall take into account any additional incentives provided under this subtitle;

"(G) future rent adjustments shall be—

"(i) made by applying an annual factor (to be determined by the Secretary) to the

portion of rent attributable to operating expenses for the housing and by making changes in the annual authorized return under section 214; and

"(ii) subject to a procedure, established by the Secretary, for owners to apply for rent increases not adequately compensated by annual adjustment under clause (i), under which the Secretary may increase rents in excess of the amount determined under clause (i) only if the Secretary determines such increases are necessary to reflect extraordinary necessary expenses of owning and maintaining the housing; and

"(H) any savings from reductions in operating expenses due to management efficiencies shall be deposited in project reserves for replacement and the owner shall have periodic access to such reserves, to the extent the Secretary determines that the level of reserves is adequate and that the housing is maintained in accordance with the standards established under section 222(d); and

"(3) no incentives under section 219 (other than to purchasers under section 220) may be provided until the Secretary determines the project meets housing standards under subsection (d), except that incentives under such section and other incentives designed to correct deficiencies in the project may be provided.

"(b) IMPLEMENTATION.—Any agreement to maintain the low-income affordability restrictions for the remaining useful life of the housing may be made through execution of a new regulatory agreement, modifications to the existing regulatory agreement or mortgage, or, in the case of the prepayment of a mortgage or voluntary termination of mortgage insurance, a recorded instrument.

"(c) DETERMINATION OF REMAINING USEFUL LIFE.—

"(1) DEFINITION.—For purposes of this title, the term 'remaining useful life' means, with respect to eligible low-income housing, the period during which the physical characteristics of the housing remain in a condition suitable for occupancy, assuming normal maintenance and repairs are made and major systems and capital components are replaced as becomes necessary.

"(2) STANDARDS.—The Secretary shall, by rule under section 553 of title 5, United States Code, establish standards for determining when the useful life of an eligible low-income housing project has expired. The determination shall be made on the record after opportunity for an hearing.

"(3) OWNER PETITION.—The Secretary shall establish a procedure under which owners of eligible low-income housing may petition the Secretary for a determination that the useful life of such housing has expired. The procedure shall not permit such a petition before the expiration of the 50-year period beginning upon the approval of a plan of action under this

subtitle with respect to such housing. In making a determination pursuant to a petition under this paragraph, the Secretary shall presume that the useful life of the housing has not expired, and the owner shall have the burden of proof in establishing such expiration. The Secretary may not determine that the useful life of any housing has expired if such determination results primarily from failure to make regular and reasonable repairs and replacement, as became necessary.

"(4) TENANT AND COMMUNITY COMMENT AND APPEAL.—In making a determination regarding the useful life of any housing pursuant to a petition submitted under paragraph (3), the Secretary shall provide for comment by tenants of the housing and interested persons and organizations with respect to the petition. The Secretary shall also provide the tenants and interested persons and organizations with an opportunity to appeal a determination under this subsection.

"(d) HOUSING STANDARDS.—

"(1) ESTABLISHMENT AND INSPECTION.—The Secretary shall, by regulation, establish standards regarding the physical condition in which any eligible low income housing project receiving incentives under this subtitle shall be maintained. The Secretary shall inspect each such project not less than annually to ensure that the project is in compliance with such standards.

"(2) SANCTIONS.—

"(A) IN GENERAL.—The Secretary shall take any action appropriate to require the owner of any housing not in compliance with such standards to bring such housing into compliance with the standards, including—

"(i) directing the mortgagee, with respect to an equity take-out loan under section 241(f) of the National Housing Act, to withhold the disbursement to the owner of any escrowed loan proceeds and requiring that such proceeds be used for repair of the housing; and

"(ii) reduce the amount of the annual authorized return, as determined by the Secretary, for the period ending upon a determination by the Secretary that the project is in compliance with the standards and requiring that such amounts be used for repair.

"(B) CONTINUED COMPLIANCE.—To ensure continued compliance with the standards for a project subject to any action under subparagraph (A), the Secretary may also limit access of the owner to such amounts and use of such amounts for not more than the 2-year period beginning upon the determination that project is in compliance with the standards.

"(C) REMOVAL OF ASSISTANCE.—If, upon inspection, the Secretary determines that any eligible low income housing project has failed to comply with the standards

established under this subsection for 2 consecutive years, the Secretary may take 1 or more of the following actions:

"(i) Subject to availability of amounts provided in appropriations Acts, provide assistance under sections 8(b) and 8(o) of the United States Housing Act of 1937 (other than project-based assistance attached to the housing) for any tenant eligible for such assistance who desires to terminate occupancy in the housing. For each unit in the housing vacated pursuant to the provision of assistance under this clause, the Secretary may, notwithstanding any other law or contract for assistance, cancel the provision of project-based assistance attached to the housing for 1 dwelling unit, if the housing is receiving such assistance.

"(ii) In the case of housing for which an equity takeout loan has been made under section 241(f) of the National Housing Act, declare such loan to be default and accelerate the maturity date of the loan.

"(iii) Declare any rehabilitation loan insured or provided by the Secretary (with respect to the housing) to be in default and accelerate the maturity date of the loan.

"(iv) Suspend payments under or terminate any contract for project-based

rental assistance under section 8 of the United States Housing Act of 1937.

"(v) Take any other action authorized by law or the project regulatory agreement to ensure that the housing will be brought into compliance with the standards established under this subsection.

"(e) WINDFALL PROFITS.—The Secretary shall submit a report to the Congress not later than 90 days after the enactment of the Cranston-Gonzalez National Affordable Housing Act, evaluating the availability, quality, and reliability of data to measure the accessibility of decent, affordable housing in all areas where properties are eligible to submit a notice of intent to prepay under section 212. To prevent payment of windfall profits, the Secretary may make available incentive payments under section 219 or 220 only to owners in those rental markets where there is an inadequate supply of decent, affordable housing, if the Secretary determines that adequate data can be obtained to permit objective and fair implementation or where necessary to accomplish the other public policy objectives under this subtitle. The Secretary shall implement this subsection in a manner consistent with the process established by this subtitle.

* * *

"SEC. 224. PERMISSIBLE PREPAYMENT OR VOLUNTARY TERMINATION AND MODIFICATION OF COMMITMENTS.

"(a) IN GENERAL.—Notwithstanding any limitations on prepayment or voluntary termination under this subtitle, an owner may terminate the low-income affordability restrictions through prepayment or voluntary termination, subject to compliance with the provisions of section 223, under one of the following circumstances:

"(1)(A) The Secretary approves a plan of action under section 219(a), but does not provide the assistance approved in such plan during the 15-month period beginning on the date of approval.

"(B) After the date that the housing would have been eligible for prepayment pursuant to the terms of the mortgage (notwithstanding this subtitle), the Secretary approves a plan of action under section 220 or 221, but does not provide the assistance approved in such plan before the earlier of (i) the expiration of the 2-month period beginning on the commencement of the 1st fiscal year beginning after such approval, or (ii) the expiration of the 6-month period beginning on the date of approval.

"(C) The Secretary approves a plan of action under section 220 or 221 for any eligible low-income housing not covered by subparagraph (B), but does not provide the assistance approved in such plan before the earlier of (i) the expiration of the 2-month period beginning on the commencement of the 1st fiscal year beginning after such approval, or (ii) the expiration of the 9-month period beginning on the date of approval.

"(2) An owner who intended to transfer the housing to a qualified purchaser under section 220 or 221, and fully complied with the provisions of such section, did not receive any bona fide offers from any qualified purchasers within the applicable time periods.

In the event that the purchaser under the plan of action is unable to consummate the purchase for reasons other than the failure of the Secretary to provide incentives, an owner may terminate the low-income affordability restrictions through prepayment or voluntary termination subject to the provisions of sections 220 and 221.

"(b) SECTION 8 RENTAL ASSISTANCE.—When providing rental assistance under section 8, the Secretary may enter into a contract with an owner, contingent upon the future availability of appropriations for the purpose of renewing expiring contracts for rental assistance as provided in appropriations Acts, to extend the term of such rental assistance for such additional period or periods necessary to carry out an approved plan of action. The contract and the approved plan of action shall provide that, if the Secretary is unable to extend the term of such rental assistance or is unable to develop a revised package of incentives providing benefits to the owner comparable to those received under the original approved plan of action, the Secretary, upon the request of the owner, shall take the following actions (subject to the limitations under the following paragraphs):

"(1) MODIFICATION OF COMMITMENTS.—Modify the binding commitments made pursuant

to section 222(a)(2) that are dependent on such rental assistance.

"(2) TERMINATION OF PLAN OF ACTION.—Permit the owner to prepay the mortgage and terminate the plan of action and any implementing use agreements or restrictions, but only if the owner agrees in writing to comply with provisions of section 223.

At least 30 days before making a request under this subsection, an owner shall notify the Secretary of the owner's intention to submit the request. The Secretary shall have a period of 90 days following receipt of such notice to take action to extend the rental assistance contract and to continue the binding commitments under section 222(a)(2).

"SEC. 225. TIMETABLE FOR APPROVAL OF PLAN OF ACTION.

"(a) NOTIFICATION OF DEFICIENCIES.—Not later than 60 days after receipt of a plan of action, the Secretary shall notify the owner in writing of any deficiencies that prevent the plan of action from being approved. If deficiencies are found, such notice shall describe alternative ways in which the plan may be revised to meet the criteria for approval.

"(b) NOTIFICATION OF APPROVAL.—

"(1) IN GENERAL.—Not later than 180 days after receipt of a plan of action, or such longer period as the owner requests, the Secretary shall notify the owner in writing whether the plan of action, including any revisions, is approved. If approval is withheld, the notice shall describe—

"(A) the reasons for withholding approval; and

"(B) the actions that could be taken to meet the criteria for approval.

"(2) OPPORTUNITY TO REVISE.—The Secretary shall subsequently give the owner a reasonable opportunity to revise the plan of action and seek approval.

"(c) DELAYED APPROVAL.—If the Secretary does not approve a plan of action within the period under subsection (b), the Secretary shall provide incentives and assistance under this subtitle in the amount that the owner would have received if the Secretary had complied with such time limitations. The preceding sentence shall not apply if the plan of action was not approved because of deficiencies. An owner may bring an action in the appropriate Federal district court to enforce this subsection.

* * *

"SEC. 229. DEFINITIONS.

"For purposes of this subtitle:

"(1) The term 'eligible low-income housing' means any housing financed by a loan or mortgage—

"(A) that is—

"(i) insured or held by the Secretary under section 221(d)(3) of the National Housing Act and assisted under section 101 of the Housing and Urban

Development Act of 1965 or section 8 of the United States Housing Act of 1937;

"(ii) insured or held by the Secretary and bears interest at a rate determined under the proviso of section 221(d)(5) of the National Housing Act;

"(iii) insured, assisted, or held by the Secretary or a State or State agency under section 236 of the National Housing Act; or

"(iv) held by the Secretary and formerly insured under a program referred to in clause (i), (ii), or (iii); and

"(B) that, under regulation or contract in effect before February 5, 1988, is or will within 24 months become eligible for prepayment without prior approval of the Secretary.

"(2) The term 'Federal cost limit' means, for any eligible low-income housing, the amount determined under section 215(a).

"(3) The term 'low-income affordability restrictions' means limits imposed by regulation or regulatory agreement on tenant rents, rent contributions, or income eligibility in eligible low-income housing.

"(4) The terms 'low-income families or persons' and 'very low-income families or persons' mean families or persons whose incomes do not exceed the respective levels established for low-income families and very

low-income families, respectively, under section 3(b)(2) of the United States Housing Act of 1937.

"(5) The term 'moderate-income families or persons' means families or persons whose incomes are between 80 percent and 95 percent of the median income for the area, as determined by the Secretary with adjustments for smaller and larger families.

"(6) The term 'nonprofit organization' means any private, nonprofit organization that—

"(A) is organized or chartered under State or local laws;

"(B) has no part of its net earnings inuring to the benefit of any member, founder, contributor, or individual;

"(C) complies with standards of financial accountability acceptable to the Secretary; and

"(D) has among its principal purposes significant activities related to the provision of decent housing that is affordable to very low-, low-, and moderate-income families.

"(7) The term 'owner' means the current or subsequent owner or owners of eligible low-income housing.

"(8) The term 'preservation equity' means, for any eligible low-income housing—

"(A) for purposes of determining the authorized return under section 214(a) and providing incentives to extend the low-income affordability restrictions on the housing under section 219—

"(i) the preservation value of the housing determined under section 213(b)(1); less

"(ii) any debt secured by the property; and

"(B) for purposes of determining incentives under section 220 and 221 and determining the amount of an acquisition loan under the provisions of section 241(f)(3) of the National Housing Act—

"(i) the preservation value of the housing determined under section 213(b)(2); less

"(ii) the outstanding balance of the federally-assisted mortgage or mortgages for the housing.

"(9) The term 'preservation value' means, for any eligible low-income housing, the applicable value determined under paragraph (1) or (2) of section 213(b).

"(10) The term 'Secretary' means the Secretary of Housing and Urban Development.

"(11) The term 'resident council' means any incorporated nonprofit organization or association that—

"(A) is representative of the resident of the housing;

"(B) adopts written procedures providing for the election of officers on a regular basis; and

"(C) has a democratically elected governing board, elected by the residents of the housing.

"SEC. 230. NOTICE TO TENANTS.

"Where a provision of this subtitle requires that information or material be given to tenants of the housing, the requirement may be met by (1) posting a copy of the information or material in readily accessible locations within each affected building, or posting notices in each such location describing the information or material and specifying a location, as convenient to the tenants as is reasonably practical, where a copy may be examined, and (2) supplying a copy of the information or material to a representative of the tenants.

"SEC. 231. DEFINITIONS OF QUALIFIED AND PRIORITY PURCHASER AND RELATED PARTY RULE.

"(a) PRIORITY PURCHASER.—The term 'priority purchaser' means (A) a resident council organized to acquire the housing in accordance with a resident homeownership program that meets the requirements of section 231; and (B) any nonprofit organization or State or local agency that agrees to maintain low-income affordability restrictions for the remaining useful life of the housing (as determined under section 222(d)).

"(b) QUALIFIED PURCHASER.—The term 'qualifed purchaser' means any entity that agrees to maintain low-income affordability restrictions for the remaining useful life of the housing (as determined under section 222(d)), and includes for-profit entities and priority pruchasers.

"(c) RELATED PARTIES.—Except as provided in subsection (d), the terms 'qualified purchaser' and 'priority purchaser' do not include any entity that, either directly or indirectly, is wholly or partially owned or controlled by the owner of the housing being transferred under this subtitle, is under whole or partial common control with such owner, or has any financial interest in such owner or in which such owner has any financial interest. The Secretary shall issue any regulations appropriate to implement the preceding sentence.

"(d) MANAGEMENT EXCEPTION.—A qualified purchaser shall not be precluded from retaining as a property management entity a company that is owned or controlled by the selling owner or a principal thereof if retention of the management company is neither a condition of sale nor part of consideration paid for sale and the property management contract is negotiated by the qualified purchaser on an arm's length basis.

* * *

SEC. 604. TRANSITION PROVISIONS.

(a) HOUSING ELIGIBLE FOR ELECTION.—Any owner of housing that becomes eligible low-income housing before January 1, 1991 and who, before such date, filed a notice of intent under section 222 of the Emergency Low Income Housing Preservation Act of 1987 (as such section existed before the date of the enactment of this Act) or under section 212 of such Act (as amended by section 601(a)) may elect to be subject to (1) the provisions of such Act as in effect

before the date of the enactment of this Act, or (2) the provisions of the Low-Income Housing Preservation and Resident Homeownership Act of 1990, after the date of the enactment of this Act. The Secretary shall establish procedures for owners to make the election under the preceding sentence.

(b) RIGHT OF CONVERSION TO NEW SYSTEM.—Any owner who has filed a plan of action on or before October 11, 1990, shall have the right to convert to the system of incentives and restrictions under this subtitle, with such adjustments as the Secretary determines to be appropriate to compensate for the value of any incentives the owner received under the Emergency Low Income Housing Preservation Act of 1987. Owners filing plans after such date shall not have any right under this subsection.

(c) EFFECTIVENESS OF REPEALED PROVISIONS.—Notwithstanding the amendment made by section 601(a), the provisions of the Emergency Low Income Housing Preservation Act of 1987 (as in effect immediately before the date of the enactment of this Act) shall apply with respect to any housing for which the election under subsection (a)(1) is made.

(d) REGULATIONS.—Not later than the expiration of the 90-day period beginning on the date of the enactment of this Act, the Secretary of Housing and Urban Development shall, subject to the provisions of section 553 of title 5, United States Code, publish proposed rules to implement this subtitle and the amendments made by this subtitle. Not later than 45 days after the expiration of the period under the preceding sentence the Secretary shall issue interim or final rules to implement such provisions.

SEC. 605. EFFECTIVE DATE.

This subtitle shall take effect on the date of the enactment of this Act.

* * *

Supreme Court, U.S.
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No. 08-505

In the Supreme Court of the United States

CCA ASSOCIATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether legislation regulating the prepayment of loans insured by the Department of Housing and Urban Development (HUD) effected a physical or per se taking of private property requiring just compensation under the Fifth Amendment.

2. Whether, under the takings analysis set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), a court evaluating the economic impact of legislation regulating the prepayment of HUD-insured loans should take into account both the offsetting benefits provided by the legislation and the legislation's economic effects on the value of the property as a whole.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter* but is reprinted at 284 Fed. Appx. 810. The opinion of the Court of Federal Claims (Pet. App. 4a-94a) is reported at 75 Fed. Cl. 170.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 2008. The petition for a writ of certiorari was filed on October 15, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Since 1968, Section 221(d)(3) of the National Housing Act, 12 U.S.C. 1715*l*(d)(3), has authorized the Department of Housing and Urban Development (HUD)

to stimulate the private development of moderate- and low-income housing by providing mortgage insurance and funding for below-market-interest-rate loans. Under the Section 221(d)(3) Program, a private developer enters into a "regulatory agreement" with HUD whereby the owner accepts specific restrictions on the mortgaged property, including restrictions on tenant income, allowable rental rates, and cash distributions that could be received from the project. Pet. App. 8a; see generally *Cienega Gardens* v. *United States*, 331 F.3d 1319, 1325-1326 (Fed. Cir. 2003) (*Cienega VIII*). The regulatory agreement remains in effect as long as the property is subject to the insured mortgage, and the mortgage note prohibits prepayment of the mortgage without the government's approval for the project's first 20 years. Pet. App. 9a-10a.

b. In the late 1980s, as the 20-year anniversary approached for many Section 221(d)(3) properties, Congress became concerned that many owners would prepay their mortgages, triggering a dramatic drop in the Nation's supply of low-income housing. Pet. App. 11a; see, *e.g.*, H.R. Conf. Rep. No. 426, 100th Cong., 1st Sess. 192 (1987) (*1987 Conf. Rep.*). In 1988 and 1990, Congress enacted two statutes, the Emergency Low Income Housing Preservation Act (ELIHPA), Pub. L. No. 100-242, Tit. II, 101 Stat. 1877, and the Low Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA), 12 U.S.C. 4101 *et seq.* (collectively, the Preservation Statutes), to preserve low-income housing.

ELIHPA contained a two-year sunset provision and instituted a permitting process under which owners interested in prepaying their mortgages were required to apply to HUD for approval. §§ 221-223, 101 Stat. 1878.

That enabled HUD, using the agency's knowledge and expertise, to assess whether a project's preservation as low-income housing was warranted. *1987 Conf. Rep.* 194. As an alternative to prepayment, Congress authorized various financial benefits available to owners, including a government-insured, equity-take-out loan, increased annual cash distributions, housing assistance contracts, and financing for capital improvements. ELIHPA §§ 224(b), 231, 101 Stat. 1880, 1884. In exchange for those financial benefits, owners agreed to extend existing use restrictions on the property. ELIHPA § 225(b), 101 Stat. 1881. ELIHPA also authorized HUD to facilitate a project's sale to a qualified nonprofit organization. § 224(b)(7), 101 Stat. 1880. Participation by owners in the preservation process was voluntary. Pet. App. 15a.

Like its predecessor, LIHPRHA vested HUD with regulatory jurisdiction over prepayment, required owners to seek approval to prepay their HUD-insured mortgages, and provided opportunities to exit the program or to seek monetary benefits in the event of a denial of prepayment. 12 U.S.C. 4101(a), 4108-4110, 4114. LIHPRHA also allowed an owner to sell property to a "qualified purchaser[]" at the "fair market value of the housing based on the highest and best use of the property," *i.e.*, the project's market value *without* HUD restrictions. 12 U.S.C. 4103(b)(2), 4110(b)(1). To facilitate such sales, which would entirely release owners from the program, HUD funded virtually all transaction costs and provided loans that enabled non-profit organizations to acquire projects. 12 U.S.C. 4110(d). An owner seeking to sell would be allowed to prepay and exit the program if it could not complete a sale under the program. 12 U.S.C. 4114(a)(1)(B); Pet. App. 20a.

Like ELIHPA, LIHPRHA permitted HUD to offer owners financial incentives to extend their properties' use restrictions. 12 U.S.C. 4109. HUD could provide owners rent increases, an increased rate of return, access to project equity through a government-insured loan, and financing for capital improvements. *Ibid.*

c. The Preservation Statutes were criticized for their generous provisions and cost to the government. Pet. App. 131a. Such concerns ultimately resulted in passage of the Housing Opportunity Program Extension Act of 1996 (HOPE Act), Pub. L. No. 104-120, 110 Stat. 834. Although the HOPE Act did not expressly repeal LIHPRHA, it "restored the prepayment rights to owners" of moderate- and low-income housing. *Chancellor Manor* v. *United States*, 331 F.3d 891, 896 (Fed. Cir. 2003); see Pet. App. 22a.

2. Petitioner owns Chateau Cleary Apartments, a moderate-income apartment complex outside New Orleans that was developed under HUD's Section 221(d)(3) Program. Pet. App. 24a-31a. In 1969, petitioner's predecessors decided to build and operate the complex. *Id.* at 25a. Pursuant to a regulatory agreement, HUD insured a 40-year loan for $1,601,100 at a below-market interest rate, and two years later it insured a larger mortgage of $1,699,500. *Id.* at 25a-27a.

In 1991, when petitioner had completed 20 years in the Section 221(d)(3) Program, the property was subject to ELIHPA and LIHPRHA. Petitioner was free to choose among the options available under the Preservation Statutes. Despite being advised that it was eligible for reduced regulation and significant incentives, and despite being aware that a non-profit organization was interested in purchasing Chateau Cleary in order to preserve it as affordable housing, petitioner chose not to

take the actions necessary to seek incentives or permission to sell the property. Pet. App. 29a. In September 1998, after the enactment of the HOPE Act, petitioner prepaid the remainder of its mortgage and exited the Section 221(d)(3) Program. *Id.* at 30-31a.

3. On May 13, 1997, petitioner filed suit in the Court of Federal Claims (CFC), asserting breach of contract and takings claims against the United States. Pet. App. 31a. In 1998, the CFC stayed proceedings pending the resolution of other cases involving similar challenges to the Section 221(d)(3) Program. In 2001, the Federal Circuit held in *Cienega Gardens* v. *United States*, 265 F.3d 1237 (*Cienega VI*), that the Preservation Statutes did not amount to a physical invasion, and thus did not constitute a per se taking. In 2003, the Federal Circuit issued further decisions and remand orders in *Cienega VIII*, and *Chancellor Manor*. The CFC then lifted its stay in this case, and the suit proceeded to trial. Pet. App. 31a.

Meanwhile, the CFC also held trials in *Cienega Gardens* and *Chancellor Manor*. The court concluded in those cases that the government had temporarily taken the plaintiffs' contractual rights to prepay their mortgages. On November 22, 2005, the CFC entered judgment for those plaintiffs. *Cienega Gardens* v. *United States*, 67 Fed. Cl. 434 (2005), vacated, 503 F.3d 1266 (Fed. Cir. 2007). The United States appealed both judgments.

In September 2006, the CFC in this case held an eight-day trial on petitioner's as-applied, regulatory-taking claim. The court issued its opinion and entered judgment on January 31, 2007. Pet. App. 4a-94a. Based on its analysis under the framework set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S.

104 (1978) (*Penn Central*), the CFC held that the government had temporarily taken petitioner's right to prepay its HUD-insured mortgage. Pet. App. 47a-77a. The court awarded $841,839 in compensation plus interest. *Id.* at 93a-94a.

4. The United States appealed. After the government had filed its initial brief, but before petitioner had filed its brief as appellee, a specially-assembled seven-judge panel of the Federal Circuit decided the appeals in *Cienega Gardens* and *Chancellor Manor*. See *Cienega Gardens* v. *United States*, 503 F.3d 1266 (2007) (*Cienega X*), cert. dismissed, 129 S. Ct. 17, and 129 S. Ct. 18 (2008). A six-judge majority of that panel vacated the judgments and remanded the cases "for a new *Penn Central* analysis under the correct legal standard." *Id.* at 1291. The court based its remand on four conclusions that are relevant here.

First, noting that the CFC had only "compared the rate of the return that the owner would receive on its investment with and without the restriction of a single year," the Federal Circuit held that the CFC had erred in failing to take into account the effect of the restriction on the property as a whole. *Cienega X*, 503 F.3d at 1280. The court observed that different methodologies might be used to measure that impact, and it directed the CFC on remand to consider all possible alternatives. *Id.* at 1282.

Second, the Federal Circuit held that the CFC had erroneously failed to consider the offsetting benefits that the statutory scheme afforded, which were specifically designed to ameliorate the effect of the prepayment restrictions. *Cienega X*, 503 F.3d at 1283-1284. The court recognized in particular that "[t]he sale and use agreement options * * * conferred considerable

benefits on the owners." *Id.* at 1286. The court concluded that, "[i]n considering whether the owners that elected to enter into use agreements suffered a taking, available offsetting benefits must be taken into account generally, along with the particular benefits that actually were offered to the plaintiffs." *Id.* at 1287.

Third, the Federal Circuit held that the CFC had erred in not considering the duration of the legislation. It directed that, "[o]n remand, the court must consider that the owners * * * were only subjected to the legislation for a limited period of 19 to 27 months." *Cienega X*, 503 F.3d at 1288.

Finally, the Federal Circuit held that the CFC had erred in its treatment of the investment-backed-expectations prong of the *Penn Central* analysis. *Cienega X*, 503 F.3d at 1288. Although it found no error in the CFC's conclusion that the owners had subjectively expected to be allowed to prepay their mortgages after 20 years, it held that the CFC had erred "in part in its analysis of the reasonableness of the plaintiffs' expectations." *Ibid.*

In its brief below, petitioner specifically addressed the analysis and holdings of *Cienega X*, Pet. C.A. Br. 16-18, 41-55, as the government did in its reply brief, Gov't C.A. Reply Br. 17-31. After oral argument, the court of appeals vacated the CFC's judgment in this case and remanded for further proceedings in accordance with *Cienega X*. Pet. App. 1a-3a. The court specifically noted that, on remand, "both sides" should be allowed "to supplement the record with additional relevant evidence if they wish to do so." *Id.* at 3a (quoting *Cienega X*, 503 F.3d at 1291).

ARGUMENT

Petitioner's challenge to the court of appeals' interlocutory decision depends in part upon a physical-taking argument that was not pressed or passed upon below and is not supported by this Court's cases. The complexity of LIHPRHA, and the fact-specific nature of HUD's application of the statute to individual owners, make the use of rigid categorical-taking tests inappropriate in this context. The guidance that the Federal Circuit provided for application on remand of the ad hoc, fact-based regulatory-taking analysis prescribed by *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978) (*Penn Central*), is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. As a threshold matter, petitioner's challenge to the court of appeals' decision is premature because that decision is interlocutory. The case was "remand[ed]" to the CFC "for further consideration in accordance with *Cienega X*," with instructions that "'both sides'" be allowed to "'supplement the record with additional evidence.'" Pet. App. 3a (quoting *Cienega Gardens* v. *United States*, 503 F.3d 1266, 1291 (Fed. Cir. 2007) (*Cienega X*), cert. dismissed, 129 S. Ct. 17, and 129 S. Ct. 18 (2008)). Although petitioner suggests that "there will be no percolation" of the relevant issues in the lower courts, Pet. 36, and further contends that the Federal Circuit's decision "would deny just compensation for virtually all temporary regulatory takings," Pet. 35-36, petitioner does not assert that it has no arguments to press on remand. If, on remand, petitioner satisfies the economic-impact analysis prescribed by *Cienega X*, the predicates for its current petition will be rendered moot. By contrast, if petitioner fails to establish that it had

reasonable investment-backed expectations (an aspect of *Cienega X*'s formulation of the *Penn Central* test that petitioner does not currently challenge), its objections to the Federal Circuit's economic-impact analysis might be altogether unavailing.

Because petitioner's need for legal relief is contingent on the ultimate resolution of the case on remand, this Court should follow its general practice of "await[ing] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., opinion respecting the denial of certiorari). That will not prevent petitioner from "raising the same issues in a later petition, after final judgment has been rendered." *Ibid.* It will, however, ensure that this Court would evaluate the lower courts' analysis only if it became "absolutely necessary" to address petitioners' constitutional arguments, *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting *Burton* v. *United States*, 196 U.S. 283, 295 (1905))—and only upon a full record, which is a particularly appropriate concern in light of the "fact specific inquiry" that the Court has prescribed in the "regulatory taking context," *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002) (*Tahoe-Sierra*).

Review by this Court at the current interlocutory stage would be particularly inappropriate in light of the sequence of events that culminated in the decision below. The bulk of the petition for a writ of certiorari is in substance a request that this Court review the legal analysis set forth in the Federal Circuit's decision in *Cienega X*. To this point, however, *no* court has applied the *Cienega X* framework to the circumstances of petitioner's own case.

2. Petitioner contends (Pet. 22) that the Federal Circuit erred in 2001 when it concluded that LIHPRHA should be analyzed as a potential regulatory taking rather than as a "[f]orced [p]hysical [o]ccupation" of real property. See *Cienega Gardens* v. *United States*, 265 F.3d 1237, 1248-1249 (*Cienega VI*); see generally *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (describing the difference between physical invasions and regulatory takings). That contention is not properly before this Court because petitioner did not raise the issue in the courts below. In any event, petitioner's contention lacks merit and does not warrant further review.

a. Petitioner advances its physical-taking argument for the first time in this Court. Its sole contention in the CFC was that the application of LIHPRHA to petitioner's property constituted a *regulatory* taking. See, *e.g.*, Pet. App. 44a, 76a. As a result, the government did not present evidence (such as proof that the owners of Chateau Cleary were free to rent to qualifying tenants of their choice and were free to refuse to rent to tenants) responsive to a physical-taking theory. On appeal, petitioner did not raise a physical-taking argument as an alternative basis for affirming the CFC's compensation award. To the contrary, it noted in passing—and without registering any objection—that the Federal Circuit in another case had "rejected the argument [that] ELIHPA and LIHPRHA effected a *per se* taking through an actual physical occupation." Pet. C.A. Br. 40 n.21. In remanding the case for further proceedings in the CFC, the Federal Circuit did not discuss the possibility that those statutes had effected a physical taking of petitioner's property.

This Court generally declines "to allow a petitioner to assert new substantive arguments attacking, rather

than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it." *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001). It should follow that general practice with respect to petitioner's physical-taking argument.[1]

b. Even if petitioner's physical-taking argument had been pressed or passed upon in the courts below, and were thus suitable for consideration by this Court, it lacks merit.

Petitioner argues that the Preservation Statutes effected a per se taking under *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), because they "*required* [petitioner] to submit to the physical occupation" of its property, "against its will," by "low-income tenants" beyond the 20-year period for which it had "agreed to lodge low-income tenants." Pet. 22, 24. The categorical rule announced in *Loretto*, however, applies only to *permanent* physical occupations of private property. See 458 U.S. at 432 n.9; see also *Lingle*, 544 U.S. at 538 (explaining that per se takings occur when, *inter alia*, "the government requires an owner to suffer a permanent physical invasion"). Because the restrictions imposed by LIHPRHA were indisputably

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[1] Petitioner asserts in passing (Pet. 19 n.11) that "[t]he 'physical takings' issue is properly before this Court" in light of *Yee* v. *City of Escondido*, 503 U.S. 519 (1992). In *Yee*, the Court noted that, having presented a taking "claim" in the state court, the petitioners there could present either physical- or regulatory-taking "arguments" in support of that claim in this Court. *Id.* at 534-535. The Court nevertheless declined to address petitioners' regulatory-taking argument because that argument was not fairly included within the question presented. *Id.* at 535-538. The Court explained in that regard that "[p]rudence also dictate[d] awaiting a case in which the issue was fully litigated below." *Id.* at 538.

temporary, see Pet. 11 (acknowledging that the HOPE Act restored its contractual prepayment right), the rule announced in *Loretto* would be inapposite here, even if those restrictions were tantamount to a physical occupation of petitioner's property.

Moreover, LIHPRHA did not altogether eliminate owners' rights to devise their property or exclude others, even for a temporary period. It simply regulated their *contractual options* to prepay their mortgages. Cf. *United States* v. *Riverside Bayview Homes*, 474 U.S. 121, 126 (1985) ("[T]he mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking."). LIHPRHA explicitly allowed owners to prepay their mortgages upon certain conditions, and it allowed owners to sell their property and exit the program.

Even if the sale and incentive options are disregarded, LIHPRHA was more like a rent-control statute than a physical invasion. Such statutes do not effect categorical takings under *Loretto*. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 528-529 (1992). As the Court summarized in *Tahoe-Sierra*, a government regulation that "merely *prohibits landlords from evicting tenants* unwilling to pay a higher rent" or "bans certain private uses of a portion of an owner's property * * * does not constitute a categorical taking." 535 U.S. at 322-323 (emphasis added; citations omitted). Here, property owners maintained control of their apartments, including the ability to manage their property, turn away prospective tenants, and sell the property at market value. 12 U.S.C. 4110.

Petitioner's reliance (Pet. 23-24) on *Yee*, *supra*, and on *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987), is misplaced. The Court in *Yee* suggested that a categori-

cal taking might occur if an owner were compelled "to refrain *in perpetuity* from terminating a tenancy," 503 U.S. at 528 (emphasis added), but nothing in LIHPRHA imposed such a long-term requirement. Moreover, in both *Yee* and *Florida Power Corp.*, this Court recognized a crucial distinction between tenants who are initially invited in by the owner (as here), and those who are forced upon the owner by the government. See *ibid.*; *Florida Power Corp.*, 480 U.S. at 252-253. As in those cases, LIHPRHA's regulations on the use of petitioner's property were not tantamount to physical occupations that would trigger *Loretto*'s per se analysis. *Yee*, 503 U.S. at 539; *Florida Power Corp.*, 480 U.S. at 253.

3. Petitioner argues (Pet. 24-27) that the Federal Circuit in *Cienega X* has called for an overly "[r]igid" application of *Penn Central*'s requirement that the court adjudicating a regulatory-taking claim must evaluate the pertinent regulation's economic impact. In particular, petitioner contends that the Federal Circuit erred by requiring the CFC (a) to take into account both the burdens and the benefits that property owners accrued under LIHPRHA (Pet. 28-31), and (b) to consider the effect that LIHPRHA had on the value of the property over its "entire useful life" (Pet. 31-36) (quoting *Cienega X*, 503 F.3d at 1282). Contrary to petitioner's assertions, those aspects of the decision in *Cienega X* are consistent with this Court's precedents.

a. In determining whether a government action effects a regulatory taking, this Court's precedents call for "essentially ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances." *Tahoe-Sierra*, 535 U.S. at 322 (citations and internal quotation marks omitted). In *Penn Cen-*

tral, the Court identified three factors "that have particular significance" in such inquiries: the "character of the governmental action," the "economic impact of the regulation on the claimant," and "the extent to which the regulation has interfered with distinct investment-backed expectations." 438 U.S. at 124. Petitioner's approach would artificially cabin the factors that a court could consider in evaluating a regulation's "economic impact." This Court's cases do not support that blinkered approach.

b. The court of appeals in *Cienega X* concluded that the CFC, in considering the economic impact of the Preservation Statutes, had erroneously ignored the benefits and alternatives that those statutes made available to property owners. See 503 F.3d at 1282-1287. Petitioner contends that taking account of the benefits (including the "sale" and "use agreement" options) that LIHPRHA provided to owners "will eviscerate the requirement that the government pay just compensation for regulatory takings." Pet. 27; see Pet. 27-31. That argument reflects a misunderstanding of the *Penn Central* analysis.

The "essentially ad hoc, factual inquiries necessary to determine whether a regulatory taking has occurred," *Yee*, 503 U.S. at 529 (citation and internal quotation marks omitted), are ultimately directed to the question whether the regulation in question "goes too far," *ibid.* (quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922)), or (as petitioner elsewhere acknowledges, see Pet. 25) whether the "severity of the burden that government imposes upon private property rights" is "functionally equivalent to the classic taking in which government directly appropriates private property," *Lingle*, 544 U.S. at 539. In evaluating how "far" a regu-

lation "goes," it would make no sense to judge the burdens that it imposes in isolation from any related benefits that it provides.

Indeed, this Court acknowledged as much in *Penn Central* itself. In considering the restrictions that the New York City Landmarks Preservation Law imposed on the development of designated landmarks, the Court also took into account the transferrable development rights that the law granted to the owners of a designated landmark and its adjacent properties:

> While these [transferrable development] rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of the regulation.

Penn Central, 438 U.S. at 137. Similarly, in cases involving land-use restrictions, no regulatory taking occurs when "the legislature is simply 'adjusting the *benefits and burdens* of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1017-1018 (1992) (quoting *Penn Central*, 438 U.S. at 124, and *Mahon*, 260 U.S. at 415) (emphasis added); see *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 491 (1987) ("While each of us is burdened somewhat by [property-use] restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."). If regulatory-taking analysis properly takes into account offsetting advantages that a landowner derives from restrictions imposed on the use of neighboring parcels, it should also take account of

benefits that the challenged regulatory regime *directly* confers upon the plaintiff.

In this case, LIHPRHA restricted, but did not eliminate, a project owner's right to transfer its property. 12 U.S.C. 4110. Nor did it prevent an owner from benefitting from the property's residual value. See *Penn Central*, 438 U.S. at 136 (no taking occurs where the regulation does not interfere with the ability to obtain a "reasonable return" on the owner's investment). An owner could benefit from the property's residual value by selling the property at a price based upon its appraised conventional market value, or by accepting an equity takeout loan and earning higher annual dividends based upon the project's appraised market-rate value. 12 U.S.C. 4109, 4110, 4114.

In arguing that the statutory alternatives are irrelevant to the regulatory-taking inquiry, petitioner relies primarily (Pet. 29-31) upon Justice Scalia's concurring opinion in *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). The transferable development rights at issue in *Suitum*, however, were not comparable to the sale or incentive options provided by LIHPRHA because those development rights had "nothing to do with" the owner's use of the relevant property, and were instead entirely separate rights granted to the owner by the agency. *Id.* at 747 (Scalia, J., concurring). By contrast, the statutory options to sell or to seek incentives that LIHPRHA provides relate directly to permissible *uses* of the owner's property and therefore relate to the impact of LIHPRHA on the owners' property rights.

For similar reasons, petitioner is wrong in contending (Pet. 27-28) that the Federal Circuit's decision in *Cienega X* will "eviscerate" regulatory-takings law by allowing the government to avoid a taking by paying

merely partial compensation to an owner. LIHPRHA's statutory options are alternative uses available to the owner, not separate rights to use another property or to receive cash payments from the government. Moreover, because the sale option merely regulated an existing use of petitioner's property, it could not be construed as a "new" or separate right granted as "compensation" for the restrictions upon the prepayment opportunity. In fact, pursuing the statutory options could have resulted in the exercise of the right to prepay. 12 U.S.C. 4114. Because the statutory options regulated the owner's use of its property (rather than compensating the owner), it is appropriate to consider them in evaluating the value of the owner's property as regulated.[2]

c. Petitioner also challenges (Pet. 31-36) the Federal Circuit's holding in *Cienega X* that the CFC's assessment of economic impact should include consideration of the effect that a regulatory restriction has on the petitioner's property interest "as a whole."[3] See 503 F.3d at

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[2] Petitioner contends (Pet. 28) that the court in *Cienega X* "disregarded" prior Federal Circuit precedents pertaining to the consideration of a regulation's offsetting benefits. In fact, the *Cienega X* court expressly distinguished those cases. See 503 F.3d at 1283-1284 & n.14. In any event, an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

[3] Petitioner focuses on the Federal Circuit's reference to considering a regulation's effect on total net income "over the entire useful life of the property." Pet. 31 (quoting *Cienega X*, 503 F.3d at 1282). In fact, *Cienega X*'s holding was about the necessity of considering "the economic impact of the regulation on the value of the property as a whole." 503 F.3d at 1282. Although the court mentioned the "useful life of the property" as one of two alternative approaches that could potentially be used for that analysis, it instructed the CFC to consider both of those approaches "as well as any other possible approaches" on

1280. As this Court explained in *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993), however, "a claimant's parcel of property [cannot] first be divided into what was taken and what was left for purposes of demonstrating the taking of the former to be complete," *id.* at 644. That approach would be "quite simply untenable," *Penn Central*, 438 U.S. at 130, because "[t]o the extent that any portion of property is taken, that portion is always taken in its entirety," *Concrete Pipe & Prods.*, 508 U.S. at 644 (citing *Keystone Bituminous Coal Ass'n*, 480 U.S. at 497). Because a property interest may be divided temporally as well as physically, the same reasoning applies to temporary regulatory takings that affect the value of an owner's property interest for only a limited period of time. Restricting the economic-impact analysis to the period of the alleged taking would evade the Court's "parcel as a whole" rule by transforming every "delay" into a "total ban." *Tahoe-Sierra*, 535 U.S. at 331; see *id.* at 342 (holding that the "duration of the [land-use] restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim").[4]

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remand. *Ibid.*; see p. 6, *supra*. That open-ended instruction is yet another illustration of the premature nature of petitioner's interlocutory challenge, which might not ultimately turn on "the *lifetime* value of the property" (Pet. 31) to which petitioner now objects.

[4] Petitioner attempts (Pet. 32) to distinguish *Tahoe-Sierra* on the ground that the claimants there alleged a "categorical" taking rather than a regulatory taking. But defining the relevant property interest is necessary for both kinds of claim, and this Court has applied the "parcel as a whole" rule in evaluating regulatory-taking claims. See *Concrete Pipe & Prods.*, 508 U.S. at 643-644.

4. Petitioner argues (Pet. 24-27) that the Federal Circuit's regulatory-taking analysis in *Cienega X* conflicts with this Court's decisions because it too rigidly requires the CFC to address all three *Penn Central* factors. Contrary to petitioner's contention (Pet. 27), an instruction to consider the evidence relevant to each of the three key *Penn Central* factors is fully consistent with the "flexible, ad hoc nature of the *Penn Central* analysis" and with this Court's holdings in *Hodel* v. *Irving*, 481 U.S. 704 (1987), and *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979). Neither of those decisions suggests that a court's analysis must cease before all three factors have been evaluated if a single factor strongly indicates that a taking has occurred. To the contrary, the Court in *Hodel* analyzed all three *Penn Central* factors before concluding that the plaintiffs had established a taking because the "character of the Government regulation" was sufficiently "extraordinary" to outweigh weaker showings on the other factors. 481 U.S. at 714-717. The Court in *Kaiser Aetna* also analyzed "[m]ore than one factor"—including the presence of "an actual physical invasion of [a] privately owned marina"—before finding a taking. 444 U.S. at 178, 180; see *id.* at 178 n.9 (declining to decide "whether in some circumstances" any "factor[] by itself may be dispositive" of the regulatory-taking analysis).

In any event, as explained above (pp. 8-9, *supra*), no court has yet applied the Federal Circuit's guidance in *Cienega X* to petitioner's own circumstances. Petitioner therefore cannot contend that the Federal Circuit's directive to consider all three *Penn Central* factors has actually affected the outcome of this case; petitioner's argument instead is that this aspect of the *Cienega X*

opinion *might* lead to an erroneous decision on remand. Whatever its merits, that argument is premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States

CCA ASSOCIATES,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF OF PETITIONER CCA ASSOCIATES FOR A WRIT OF CERTIORARI

The government agrees that this Petition raises important constitutional issues and, indeed, does not dispute that the Federal Circuit's decision in *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007) ("*Cienega X*"), if allowed to stand, would eliminate the Federal Government's obligation to pay just compensation for virtually every temporary confiscation of private property through regulation. The government also agrees, at least implicitly, that *Cienega X* provides a roadmap for the government to avoid paying just compensation in *every* case for which a federal regulation confiscates private property: the government need only rescind the ostensibly "permanent" regulation, thereby making it "temporary," or, alternatively, provide some partially "offsetting benefits."

Equally significant for present purposes, the government implicitly concedes that the Federal Circuit's decision in *Cienega X*, in which the court ruled that an owner must suffer a "severe economic deprivation" in order to establish a regulatory taking, conflicts with this Court's ruling in *Hodel v. Irving*, 481 U.S. 704 (1987). *See* Br. for the United States in Opp'n ("Opposition" or "Opp.") at 19. *Hodel* eschewed any rigid application of the so-called *Penn Central* factors[1] and *held* that petitioners there had

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[1] *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

suffered a regulatory taking, notwithstanding a miniscule economic loss.

Instead of questioning the importance of the issues raised in this Petition, the government principally contends that certiorari should be denied on the basis of its assertion that this Petition is premature. The government alternatively argues that certiorari should be denied because there purportedly is some basis for the Federal Circuit's holdings in prior Supreme Court precedents.

In making these arguments, the government distorts reality, selectively ignores the procedural history of this case, and misconstrues this Court's precedents. The nearly 6-year confiscatory period at issue in this case, depriving the Norman Family of more than 80% of the income that the Family otherwise would have earned during that period, requires just compensation. The Court should grant certiorari and resolve the important constitutional issues raised in the Petition.

I. THE ISSUES RAISED IN THE PETITION SHOULD BE CONSIDERED NOW

A. The Petition Is Not "Premature"

The government first argues that the Petition should be denied as premature because the Federal Circuit, in vacating the judgment in favor of the Norman Family, remanded the case for further proceedings in accordance with *Cienega X*. *See* Opp. 8-9. According to the government, "petitioner does not assert that it has no arguments to press on remand" and therefore may prevail on remand, rendering the Petition moot. *Id.*

The government misconstrues the Norman Family's position and fails to note the extent to which the *Cienega X* decision bars most, *if not virtually all*, temporary regulatory takings claims. In fact, there is no prospect for the Norman Family to prevail on remand.

Cienega X holds that any claimant who alleges that a temporary regulation has effected a taking must prove a severe diminution in the *lifetime value* of his or her property – even if the temporary regulation has lasted for years or was ostensibly permanent. *See* Pet. for a Writ of Cert. ("Pet.") at 27-36; App. to Pet. for a Writ of Cert. ("App.") at 116a-122a. According to the Federal Circuit, diminution in the lifetime value of a property may be determined in two ways: (i) by looking at the loss of income "over the entire useful life of the property" or (ii) by looking at the change in market value of the property at the time of the taking, considering the length of the regulation. App. 122a. These two approaches to measuring economic impact foreclose any regulatory takings claim by the Norman Family.

In fact, it is *mathematically impossible* for the Norman Family, under either of these two approaches, to establish a "severe economic deprivation" on the order of 75% or more as required by Federal Circuit precedent.[2] App. 121a ("a

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[2] For example, if one assumes (i) a 30-year useful life of Chateau Cleary Apartments ("Chateau Cleary") as of May 1991 when the taking began, (ii) a government confiscation of 80% of the cash flow for 5 years (the Court of Federal Claims ("COFC") found that the Norman Family suffered an 81% loss over a period of nearly 6 years), (iii) no growth, and (iv) a huge discount rate of 15%, then the economic impact would be 40%.

regulatory taking does not occur unless there are serious financial consequences" that rise to the level of "severe economic deprivation"); *Cienega Gardens v. United States*, 67 Fed. Cl. 434, 470 (2004) (at least 75% loss is required under Federal Circuit precedent). The government already has developed evidence indicating that the Norman Family suffered an economic impact of less than 20% considering the lifetime value of Chateau Cleary. App. 71a.

In short, the government's position – "petitioner does not assert that it has no arguments to press on remand" – is simply wrong. The Norman Family has no possibility to prevail on remand under the Federal Circuit's test.

Finally, the notion that this Petition is premature is nothing if not ironic. This case already has been pending for nearly *12 years*. There has been full discovery, a 7-day trial, a site visit, judgment for the Norman Family and appeal. Nothing will be accomplished by delaying certiorari except the further delay of justice.

[Footnote continued from previous page]

If one used real-world assumptions, rather than these extreme, illustrative assumptions, the economic impact would only decrease.

Similarly, if one were to utilize the alternative measure endorsed by the Federal Circuit, the change-in-market-value approach, the economic impact would be even less. Indeed, at trial the government's expert testified without contradiction that the Norman Family suffered an economic impact of less than 20% under the change-in-market-value approach. App. 71a.

B. The Court Should Consider The Physical Takings Argument

The government next argues that the Court should deny certiorari because the Norman Family did not press in the lower courts the argument that the government's action here – forcing the Norman Family to house low-income, HUD-approved tenants for a period of years – resulted in a *per se*, physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Opp. 10-11. However, the government neglects to mention the reason why the Norman Family previously advanced a regulatory and not a physical takings theory: By the time of trial, the Federal Circuit unambiguously had held that an owner seeking just compensation for LIHPRHA's confiscation of the prepayment right must proceed under *Penn Central* and not a *per se*, physical takings theory. *See Cienega Gardens v. United States*, 265 F.3d 1237, 1248 (Fed. Cir. 2001) *("Cienega VI")* (rejecting owners' physical takings claims); *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003) *(Cienega VIII)*; Pet. 13-15, 22-23, 31-32 (discussing *Cienega VI* and *Cienega VIII* decisions).

The Federal Circuit's decision in *Cienega VI*, in which the court foreclosed any and all claims under *Loretto*, still stands. Absent this Court's review, there is no prospect of the Norman Family's succeeding on this theory in the future, just as there was no prospect of the Norman Family's succeeding on this theory at trial and on appeal.

The Court should reject as silly the government's suggestion that certiorari should be denied so that a further factual record can be developed. *See* Opp.

10. The COFC expressly found that LIHPRHA had the effect of confiscating the Norman Family's prepayment right and binding the Norman Family to the terms of the regulatory agreement with HUD for a period of 20 additional years. As found by the COFC, and not challenged by the government, the regulatory agreement, *inter alia*:

- limited the occupancy of Chateau Cleary to low- or moderate-income families;
- provided that all rents had to be approved by HUD;
- required that Chateau Cleary be managed "in a manner satisfactory to [HUD]"; and
- limited the Norman Family to an annual return on the initial equity investment of just 6%, or $12,952.

App. 8a. In other words, the undisputed facts establish that Congress, through LIHPRHA, compelled the Norman Family to house low-income tenants. The Norman Family lost completely the right to charge market rents or to tear down Chateau Cleary and make some other use of the land. When one HUD-approved tenant left, the Norman Family had no choice but to rent to some other HUD-approved tenant at a HUD-approved rate.

This Court obviously may and should decide the purely legal issue as to whether these facts establish a *per se*, physical taking under *Loretto*. Indeed, the government concedes as much in a footnote. *See* Opp. 11 n.1. As acknowledged by the government, this Court in *Yee v. City of Escondido* made explicit that a petitioner could present any argument in support of his or her claim for just compensation

under the Takings Clause, even if the argument was not made in the lower courts. *See* 503 U.S. 519, 534 (1992) ("We must also reject respondent's contention that the regulatory taking argument is not properly before us because it was not made below.").

II. THE IMPORTANT ISSUES RAISED IN THE PETITION REQUIRE THIS COURT'S IMMEDIATE REVIEW

The remainder of the government's Opposition offers a defense of the Federal Circuit's rulings in *Cienega VI* and *Cienega X*. Significantly, the government nowhere challenges the importance of the issues raised in the Petition, nowhere disputes that LIHPRHA defeated the Norman Family's right to exclude others (a right this Court has described as "perhaps the most fundamental of all property interests"[3]), and nowhere disputes that *Cienega X*, if left to stand, would foreclose virtually all temporary regulatory takings claims.

A. The Federal Circuit's Holding That LIHPRHA Does Not Have The Character Of A Forced Physical Occupation Conflicts With *Loretto*

The government makes a series of arguments in support of the Federal Circuit's decision in *Cienega VI*, where the court ruled, without citation to *Loretto*, that LIHPRHA did not have the character of a forced physical occupation, notwithstanding the

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[3] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); *see also Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (the right to exclude "falls within [the] category of interests that the Government cannot take without compensation").

fact that LIHPRHA resulted in the compelled occupation of properties by low-income tenants. None has merit.

The government first says that the *Cienega VI* ruling is somehow consistent with *Loretto* because *Loretto* concerned a "permanent" physical occupation, as opposed to the "temporary" physical occupation resulting from LIHPRHA. This supposed "distinction" does not stand under this Court's precedents. The Court repeatedly has held that the government must provide just compensation for temporary physical occupations, including for occupations for less duration than the nearly 6-year occupation here. *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945).[4]

The government's other arguments similarly lack merit. For example, the government contends that LIHPRHA did not "altogether eliminate" the right to devise and exclude others because "LIHPRHA explicitly allowed owners to prepay their mortgages upon certain conditions [being met]." Opp. 12. The government neglects to mention that the COFC

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[4] The *Loretto* Court's reference to a "permanent" physical occupation means that a brief trespass by the government does not raise Takings Clause issues. *See Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991) ("If the term 'temporary' has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential, and thus properly can be viewed as no more than a common law trespass. . . .").

made express findings that those conditions could not be satisfied by the Norman Family. App. 42a.

The government also presses the argument that "LIHPRHA was more like a rent-control statute than a physical invasion." Opp. 12. This manifestly is not so. Rent control statutes do not require the landlord to continue renting his or her land. *See Yee*, 503 U.S. at 527-28. LIHPRHA did precisely this, compelling the Norman Family to rent to low-income tenants for an additional 20 years. *Compare id.* at 528 ("A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy.").

The government finally says that it somehow matters that the Norman Family and other owners participating in the HUD programs "initially invited" the low-income tenants by entering into regulatory agreements with HUD. Opp. 13. But the government overlooks the critical fact that the "invitation" only extended for 20 years, after which point the owners could prepay their mortgages and enjoy their properties however they pleased, free of any restriction.

B. The Government Acknowledges That The Federal Circuit's Rigid Application Of The *Penn Central* Factors Conflicts With This Court's Precedents

The government admits that this Court's decision in *Hodel* holds that the claimants there established a compensable regulatory taking, notwithstanding the minimal economic impact and the likely absence of investment-backed expectations. Opp. 19 ("[T]he Court in *Hodel* analyzed all three *Penn Central*

factors before concluding that the plaintiffs had established a taking because the 'character of the Government regulation' was sufficiently 'extraordinary' to outweigh weaker showings on the other factors."). The government also admits, because it does not dispute, that Federal Circuit precedent requires that an owner suffer a "severe economic deprivation," or more than a 75% loss in the lifetime value of the property, in order to establish a regulatory takings claim. *See* Pet. 25; App. 121a.

These admissions alone confirm the need for this Court's immediate review. There is no way to square the Federal Circuit's inflexible requirement of a "severe" economic loss and the *Hodel* Court's holding that a regulatory taking may be found *regardless of the severity of the economic impact* where the character of the governmental action is "extraordinary." (The character of the governmental action here – depriving the Norman Family of the fundamental right to exclude others – was the most extraordinary of all governmental actions. Pet. 26. The government does not argue otherwise.)

Tellingly, the government does not even try to address this conflict but instead misrepresents the Norman Family's argument for certiorari. *Compare* Pet. 24-27 *with* Opp. 19.

C. The Federal Circuit Has Decided Issues Reserved By This Court In Ways That Will Eliminate Virtually All Temporary Regulatory Takings Claims Against The Federal Government

The Court should grant certiorari not only to resolve the conflict between Federal Circuit

precedent and this Court's decisions in *Loretto* and *Hodel*, among others, but also because the Federal Circuit in *Cienega X* decided important issues reserved by prior decisions of this Court. In particular, the Federal Circuit ruled in *Cienega X* that statutory "offsetting benefits" must be considered in determining whether there has been a taking and, further, that the lifetime value of property must be considered in determining the economic impact of any regulation. App. 116a-131a. The government disputes neither the importance of these issues nor the twin facts that (i) the Federal Circuit's resolution of these issues will eliminate nearly every temporary regulatory takings claim against the Federal Government and (ii) the Federal Government can escape its duty to pay just compensation in every case by either providing some "offsetting benefits" or by rescinding the offending regulation, thereby making it "temporary."

First, the Court should decide whether an owner's ability to receive partially "offsetting benefits" must be considered in evaluating whether there has been a taking. Absent this Court's review, the Federal Circuit's ruling would permit the government to escape paying just compensation in every case. Justice Scalia made precisely this point in *Suitum v. Tahoe Regional Planning Agency*. *See* 520 U.S. 725, 748 (1997) (Scalia, J., concurring) ("If money that the government-regulator gives to the landowner can be counted on the question of whether there is a taking . . . rather than on the question of whether the compensation for the taking is adequate, the government can get away with paying much less.").

The government nonetheless argues that the partially offsetting benefits under LIHPRHA – the so-called "incentives" option and "sale" option – are distinguishable from the Transferable Development Rights ("TDRs") discussed in Justice Scalia's concurring opinion in *Suitum*.

This is not so. Justice Scalia analogized the TDRs to a cash payment from the government. *Id.* at 747. The "options" available to the Norman Family under LIHPRHA were no different. The "incentives" option, as the name suggests, was the equivalent of a cash payment from the government. Participating owners could receive, by way of example, greater cash dividends and subsidies. App. 128a-129a. The "sale" option likewise amounted to a cash payment after the conveyance of the property in a HUD-sanctioned process to a HUD-approved buyer. App. 126a.

Finally, the Court should grant certiorari to review the Federal Circuit's requirement that the lifetime value of property must be considered in measuring the economic impact of a regulation. Otherwise, as noted above, *supra* at 3-4, and in the Petition at 31-36, there will be no prospect for establishing a successful regulatory takings claim (at least for any regulation of finite duration).

In opposition, the government asserts only that the "lifetime-value" rule is compelled by the parcel-as-a-whole rule. Opp. 17-18. However, as implicitly acknowledged by the government, the only decision of this Court extending the parcel-as-a-whole rule to temporal considerations is *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). As explained in substantial detail in the Petition at 32-34, and

without rebuttal by the government, *Tahoe-Sierra* provides zero support for the Federal Circuit's lifetime-value rule. To the contrary, *Tahoe-Sierra* and numerous other decisions of this Court (tellingly not addressed by the government) wholly undermine the Federal Circuit's requirement to consider the lifetime value of a property in determining economic impact. Pet. 32-36.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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No. 08-505

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In the

Supreme Court of the United States

CCA ASSOCIATES,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Emergency Low Income Housing Preservation Act of 1987 and the Low-Income Housing Preservation and Resident Homeownership Act of 1990 effected a taking of Petitioner's property, without just compensation, in violation of the Fifth Amendment of the Constitution, under either the *Loretto per se* physical takings test or the *Penn Central* regulatory takings test?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Petitioner CCA Associates.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has extensive litigation experience in the area of property rights, having participated in several takings cases before this Court, including *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

PLF and its supporters have an interest in the constitutional issues raised in this case. PLF seeks to underscore the need for this Court to address how properly to evaluate temporary physical takings of the kind alleged in this case.

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[1] All parties have consented to the filing of this brief. Counsel of record for all parties received notice of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution specifically for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case concerns whether the federal government can conscript private citizens and their properties for the twenty-year housing of low-income tenants without incurring liability for a taking. The government induced Petitioner to build and operate affordable housing. Under the contract, Petitioner obtained federally insured forty-year mortgages in return for the agreement to lease its property at below-market rents for the mortgage term.

As an incentive, Petitioner could prepay the mortgage and regain complete control of its property after twenty years. But as the twenty-year mark approached, the government enacted the Emergency Low Income Housing and Preservation Act of 1987 (ELIHPA), imposing a two-year moratorium on prepayments beginning in 1988. Then, the government enacted the Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA), indefinitely cancelling prepayment rights.

Petitioner sued the government, alleging LIHPRHA effected a compensable taking under the Takings Clause of the United States Constitution. Shortly thereafter, LIHPRHA was repealed. After nearly fifteen years of litigation, the Federal Circuit rejected Petitioner's claims in light of its previous decision in *Cienega Gardens v. United States*, App. at 95a[2] (*Cienega X*), fully incorporating that previous decision into its decision in the present case.

The petition raises important constitutional issues relating to the Takings Clause of the United States

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[2] Amicus cites to the Petition for Certiorari Appendix (App.) when possible.

Constitution. Review is necessary to resolve important questions concerning the application of two takings tests—the *per se* takings test under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and the *ad hoc* takings test under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). The decisions below deepen the confusion over these tests and, in some respects, gut the protections they afford against government abuse. The Court's current takings jurisprudence provides no definitive answers to resolve this confusion.

ARGUMENT

I

REVIEW IS NECESSARY TO RESOLVE IMPORTANT QUESTIONS REGARDING THE SCOPE OF *PER SE* TAKINGS DOCTRINE

Petitioner alleges the government effected a *per se* taking of its property under *Loretto*, 458 U.S. 419, because LIHPRHA forced Petitioner to suffer a physical occupation of its property by third parties for twenty years. The Federal Circuit rejected the *per se* takings claim in light of its previous decision in *Cienega X*, App. at 95a;[3] the Federal Circuit has already decided that LIHPRHA "merely . . . enhance[d]

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[3] The Federal Circuit summarily rejected Petitioner's claims, stating it was "obligated to follow [its] earlier decision in *Cienega X*," a previous decision which addressed arguments for all relevant purposes "identical" to those in the present case. App. at 2a. Its decision totally incorporated by reference the *Cienega Gardens* line of cases, so Amicus PLF must refer to the previous decisions, particularly *Cienega X*, in addressing issues presently before this Court.

an existing tenant's possessory interest." *Cienega Gardens v. United States*, 265 F.3d 1237, 1248 (Fed. Cir. 2001) (*Cienega VI*).

While not entirely clear, its rejection of the petitioner's *per se* takings claim appears to have been based on two faulty premises. First, government-mandated physical occupations of short or limited duration—like LIHPRHA's twenty-year forced occupation of Petitioner's property—are not "permanent" enough to qualify as *per se* takings under *Loretto*. Second, once a landowner chooses a specific use for his property, a *per se* taking will never result from a government-mandated occupation or possession of the property consistent with that use. *See, e.g.*, *Cienega Gardens v. United States*, 33 Fed. Cl. 196, 214-17 (1995).

This Court's takings jurisprudence lacks an unequivocal response to these misguided premises. Review is necessary to clarify when and how the *per se* takings doctrine applies to temporary physical occupations of private property.

A. Under What Circumstances Will a Temporary Physical Occupation Effect a *Per Se* Taking?

Petitioner's *per se* taking claim is based on this Court's decision in *Loretto*, which the lower courts apparently decided does not apply to finite or temporary physical occupations. In *Loretto*, a New York statute required landlords to permit cable companies to install facilities on their properties—not indefinitely, but only "[s]o long as the property remain[ed] residential and a [cable] company wishe[d] to retain the installation." *Loretto*, 458 U.S. at 439.

The statute was challenged as effecting a *per se* taking, and this Court agreed. *Id.* at 421.

The Court observed that takings challenges to government interference with property rights originally are subject to the *Penn Central* balancing test, which requires a weighing of: (1) the character of the government action, (2) the economic impact on the property owner, and (3) the extent to which the action interferes with distinct investment-backed expectations. *Loretto*, 458 U.S. at 426 (citing *Penn Central*, 438 U.S. at 124). The Court cited "a physical invasion short of an occupation" and "a regulation that merely restricts" property use as examples of takings subject to the *Penn Central* test. *Loretto*, 458 U.S. at 430.

Then, the Court announced a new categorical or *per se* takings test. "[W]hen the physical intrusion reaches the extreme form of a permanent physical occupation," the *Penn Central* test can be dispensed with. *Id.* at 426. With a "permanent physical occupation," the character of the government's action is *the* determinative factor that renders it a categorical or *per se* taking—"without regard" to the resulting public benefit. *Id.* As the Court explained, a "permanent physical occupation" destroys the owner's essential "rights 'to possess, use and dispose of [the property].'" *Id.* at 435 (citation omitted). By requiring landlords to submit to the installation of cable facilities, depriving them of their rights to possess, use, and dispose of the occupied areas, the government effected a *per se* taking.

The Court partly based its holding on a wartime seizure case, which recognized that even short-term physical occupations by government could be

"permanent" enough to be a *per se* taking. *Id.* at 431. In *United States v. Pewee Coal Co., Inc.*, 341 U.S. 114 (1951), the federal government "possessed and operated" the property of a coal mining company for 5-1/2 months in order to stave off a nationwide miners' strike in the middle of the war. *Id.* at 115. The Court *unanimously* concluded that the government's seizure was a *per se* taking, with no regard to the occupation's relatively limited duration. *Id.* (plurality); *id.* at 119 (Reed, J., concurring); *id.* at 121-22 (Burton, J., dissenting). References to the "temporary" nature of the government's possession were made in the context only of the amount of compensation due to the plaintiff. *See, e.g., id.* at 117 (plurality). The *Loretto* Court was unmoved by the fact that the *Pewee Coal* occupation was short-lived, focusing on the character—not the duration—of the government's action. *Loretto*, 458 U.S. at 431 (Because of the " 'actual taking of possession and control,' the taking was as clear as if the Government held full title and ownership." (citing *Pewee Coal*, 341 U.S. at 116 (plurality))).

Other War Department seizure cases affirm *Pewee Coal*'s principle: short-term physical occupations are categorical takings. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16 (1949) (*per se* taking in government's temporary use and occupancy of laundromat); *United States v. Petty Motor Co.*, 327 U.S. 372, 378 (1946) (*per se* taking in the government's temporary occupation of a building through the ouster of existing tenants); *United States v. General Motor Corp.*, 323 U.S. 373, 375 (1945) (*per se* taking in the government's "temporary occupancy of a portion of a leased building" for one year). This Court repeatedly reaffirmed the continued vitality of these seizure cases. *Lingle*, 544 U.S. at 537; *First English Evangelical*

Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987).

While expressly relying on *Pewee Coal*, dictum in *Loretto* distinguished a "permanent physical occupation" (which is a *per se* taking) from a "temporary invasion" (which is not). *Loretto*, 458 U.S. at 428. In an enigmatic footnote, the Court said:

> The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical *invasion* is a taking. . . . [S]uch temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.

Id. at 436 n.12.

"This single judicial pronouncement is a principal source of the current uncertainty in the temporary physical takings jurisprudence." Dennis H. Long, Note, *The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and An Opportunity for New Directions in Takings Law*, 72 Ind. L. J. 1185, 1194 (1997). If, as the *Loretto* dictum suggests, *Penn Central*'s test applies to all "temporary" government incursions, then *Loretto* must be interpreted to have overruled *sub silentio* the wartime seizure cases, including *Pewee Coal*. This is improbable: *Loretto* unqualifiedly, expressly relies on *Pewee Coal*. *Loretto*, 458 U.S. at 431. Moreover, this Court has repeatedly reaffirmed *Pewee Coal* and the wartime seizure cases. *Lingle*, 544 U.S. at 537; *First*

English, 482 U.S. at 318. More likely, the *Loretto* Court merely suggested that *Penn Central* applies to "a class of temporary takings claims in which the duration is less than some as yet unspecified threshold"—presumably less than the five-and-a-half months spanning the *Pewee Coal* occupation. Long, *supra*, at 1194. Petitioner's claim against a twenty-year compelled physical occupation of its property is not in this class.

Courts struggle to apply *Loretto* due to its dictum, with conflicting results. In *Preseault v. United States* (*Preseault II*), 27 Fed. Cl. 69 (1992), *rev'd*, 100 F.3d 1525 (Fed. Cir. 1996) (*Preseault III*), plaintiffs owned land through which a railroad had for years owned an easement for its tracks. After the rail company abandoned the easement, plaintiffs expected the easement to revert back to them under state law. But under a federal law enacted to promote recreational use of abandoned railroad routes, the government authorized transfer of the easement as a hiking trail to a neighboring town for a maximum of thirty years. Plaintiffs challenged the government's action as a *per se* taking. *Preseault II*, 27 Fed. Cl. at 75-81.

The Court of Federal Claims found that the government's forced transfer of the easement to a third party effected a "physical occupation," but only a temporary occupation, because of the thirty-year lease limit. *Id.* at 95. Consistent with *Loretto*'s dictum, the court analyzed the physical occupation under the *Penn Central* balancing test and held there was not a taking. The Federal Circuit reversed the decision, finding (without explanation) a *per se* taking. *Preseault III*, 100 F.3d at 1552.

In contrast stands *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991). To combat ground water pollution, the federal government requested access to plaintiffs' property to install wells for monitoring and extracting waste migrating from a nearby site. Notwithstanding plaintiffs' refusal, the federal government installed the wells anyway. *Id.* at 1369. Plaintiffs challenged the government's actions as effecting a taking. The Court of Federal Claims ruled in the government's favor, and the Federal Circuit reversed. *Id.* at 1367.

Consistent with the wartime seizure cases, the Federal Circuit held that the installation of wells on plaintiffs' property constituted a permanent physical occupation, and thus a *per se* taking—regardless of the finite or even short-term duration of the occupation. *Id.* at 1378. Addressing the government's claim that the occupation was temporary, the Federal Circuit offered a different interpretation of "temporary" occupations than the Court of Federal Claims in *Preseault II*:

> "[P]ermanent" does not mean forever . . . . A taking can be for a limited term—what is "taken" is . . . an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute. . . .
>
> . . . .
>
> If the term "temporary" has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential, and

> thus properly can be viewed as no more than a common law trespass . . . .

Id. at 1376-77.

Loretto left several important questions unresolved. Does a physical occupation of a short-term or finite duration actually bar a *per se* takings claim, as the *Loretto* dictum seems to suggest? If so, how long may the government remain on private property, without consent, before its action becomes "permanent" enough to constitute a *per se* taking? Alternatively, is the dispositive factor in a *per se* taking, as the *Loretto* holding indicates, the "character of the government action"—i.e., whether "the government exercises 'complete dominion or control' over the property interest affected"? M. Reed Hopper, *A Rationale for Partial Regulatory Takings: A Closer Look at Selected United States Supreme Court Precedent*, 31 Sw. U. L. Rev. 19, 21 (2001). Review would establish *how* such intrusive government actions should be scrutinized under the Takings Clause and whether, regardless of duration, they effect a *per se* taking.

B. Does a Landowner's Decision To Make a Specific Use of His Property Bar All *Per Se* Takings Claims Against Subsequent Government-Mandated Occupations Consistent with That Use?

The Court of Federal Claims did not address whether Petitioner's claims ought to be evaluated under *Loretto*'s *per se* takings analysis; it discussed and applied only the *Penn Central* test. App. at 44a (the present action is a "regulatory takings case" to which the *Penn Central* test applies). The court seemed to

believe itself bound by previous decisions in the *Cienega Gardens* cases decreeing the *Penn Central* test applies to what were virtually identical claims. *See, e.g., Cienega VI*, 265 F.3d at 1248-49 (ELIHPA and LIHPRHA were not a *per se* taking because "'the effect of the prepayment restrictions . . . is merely to enhance an existing tenant's possessory interest,' and . . . they do not authorize a 'permanent physical occupation' of the Owners' property." (relying on *Yee v. City of Escondido,* 503 U.S. 519 (1992))).

The Court of Federal Claims previously interpreted *Loretto* and subsequent decisions of this Court as barring Petitioner's *per se* taking claim against LIHPRHA. *Id.* (*Cienega VI* court opinion citing previous *Cienega Gardens* decisions for proposition that *Loretto* does not apply to takings claims under ELIHPA and LIHPRHA). The *Cienega* court's reasoning, adopted by the Federal Circuit, was astonishing. Relying on *Yee v. City of Escondido*, 503 U.S. at 527-28, the court concluded that because investors, like Petitioner, voluntarily agreed to enter the landlord business almost forty years ago, they somehow consented to the forced housing of low-income tenants twenty years later. *Cienega Gardens v. United States*, 33 Fed. Cl. at 214-17. The *Cienega* court's reasoning, totally incorporated in the present case, App. at 2a, finds no basis in this Court's precedents—not even in *Yee*.

Yee involved a takings challenge to a mobile home rent control ordinance. Mobile home park owners claimed the ordinance, along with a state statute, effected a *per se* taking under *Loretto* by eliminating their rights to choose incoming tenants, and set the

rent charged for the pad on which the mobile home sits. *Yee*, 503 U.S. at 526-27.

This Court upheld the ordinance, concluding it did not effect a physical taking, the "element of required acquiescence is at the heart of the concept of occupation," and that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Id.* at 527 (citation and quotation marks omitted). The ordinance did no such thing:

> [N]either the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, [state law] provides that a park owner who wishes to change the use of his land may evict his tenants . . . . Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government.

Id. at 527-28. *Yee* made clear that "[t]his element of *required acquiescence* is at the heart of the concept of occupation." *Id.* at 527 (emphasis added).

Absent government compulsion, there could be no occupation under *Loretto*, and no *per se* taking. The *Yee* Court made clear it did not address a case where "the statute, on its face or as applied, [compelled] a landowner over objection to rent his property or to refrain in perpetuity." *Id.* at 528. LIHPRHA did just that, compelling the objecting petitioner to rent its property to low-income tenants for up to twenty years. Moreover, Petitioner had no reasonable means of converting its property to other uses, so its properties

were at the mercy of the government and its approved tenants. *Yee* does not control this case; *Loretto* does.

The Federal Circuit disagreed. Incorporating its decision in *Cienega Gardens*, it found that LIHPRHA was like the rent control ordinance in *Yee*, App. at 2a, and that neither law compelled Petitioner to do anything, because it essentially chose this fate. The court explained that Petitioner "entered the landlord business voluntarily, more than 20 years ago, . . . [making] LIHPRHA . . . more analogous to the rent control ordinances upheld in such cases as *Yee*." *Cienega Gardens*, 33 Fed. Cl. at 217. Thus, there was no categorical taking.

The Court of Federal Claims erred when interpreting *Yee*. Under *Yee*, if a landowner can change the property use to which a regulation applies, the regulation will not effect a *per se* taking. *Yee* does not support the court's novel theory that Petitioner's voluntary choice to make a specific use of its property bars a *per se* taking claim for subsequent physical occupations that happen to be consistent with that use. If put into practice, this theory would immunize most government-mandated physical occupations of private property against *per se* takings claims. As long as the mandated occupation or possession was consistent with the specific use of the property, the government could always point to the landowner's prior voluntary decision to engage in that use.

Moreover, the Court of Federal Claims conflated the *Loretto* and *Penn Central* tests. In analyzing a *per se* takings claim, the court imported a *Penn Central* factor: the property owner's expectations *prior* to the government wrong. *Penn Central*, 438 U.S. at 124. Yet this Court has on numerous occasions made clear

that the *only* factor *Loretto* and *Penn Central* share is the "character of the government action." *Loretto*, 458 U.S. at 434-35; *see also Lingle*, 544 U.S. at 538 (affirming the distinction between the *Loretto* and *Penn Central* tests). When the character of the government action is a permanent physical occupation of the property, it is a *per se* taking—regardless of the property owner's expectations at the time of the occupation. *Id.*

The Court of Federal Claims' approach to the *per se* takings analysis highlights a circuit split that this Court should resolve. Contrary to the court in this case, other courts interpret *Yee* as conditioning the finding of a *per se* taking on nothing more than the government's "required acquiescence" of the property owner at the time of the physical occupation (the character of the government action). *See, e.g., Gulf Power Co. v. United States*, 187 F.3d 1324, 1329 (11th Cir. 1999); *see also Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 95 (2d Cir. 1992). Review is necessary to resolve the question of whether a landowner's choice to make a specific use of his property bars all *per se* taking claims against subsequent physical occupations consistent with that use.

II

REVIEW IS NECESSARY TO ESTABLISH UNIFORMITY AMONG THE CIRCUITS ON THE PROPER INTERPRETATION AND APPLICATION OF *PENN CENTRAL*

Although Petitioner's takings claims should have been resolved in its favor under *Loretto*'s *per se* rule, the Federal Circuit, incorporating by reference its 2003 decision, at least found that Petitioner had suffered a

taking under the multi-factor balancing test of *Penn Central*. *See Cienega Gardens v. United States (Cienega VIII)*, 331 F.3d 1319, 1353 (Fed. Cir. 2003).

Under *Penn Central*, liability for just compensation under the Takings Clause depends on the offending regulation's economic impact on the property owner and the character of the government action. *Penn Central*, 438 U.S. at 124. Here, the character of the action is clear and the *Cienega VIII* reasoning applies equally: ELIHPA and LIHPRHA "[can] fairly be characterized as akin to . . . [a] physical invasion" of Petitioner's property. *Cienega VIII*, 331 F.2d at 1338. Congress's abrogation of the prepayment option effectively authorized a continuing physical occupation of Petitioner's property against its will; moreover, Congress specifically did so to force a small number of property owners to bear the full costs of providing a general public benefit (affordable housing). *Id.* The record establishes sufficient financial loss to tip the balance of that inquiry in favor of the property owner, and that "ELIHPA and LIHPRHA [frustrated Petitioner's] reasonable investment-backed expectations that [it] would be entitled to prepay." *Id.* at 1353.

The Court of Federal Claims applied this same analysis in *CCA Associates*. The court found that the character of the government's actions in adopting ELIHPA and LIHPRHA "effected a temporary taking of CCA's property." App. at 76a. Regarding the economic impact of rescinding the prepayment option, the court heard evidence on the effect on Petitioner's return on equity and consequent reduction in the value of its property, finding Petitioner had suffered detrimental economic impacts of an 81.25% diminution

in value, a "serious financial loss" supporting a finding of a temporary taking. App. at 75a-76a. Moreover, the court found that Petitioner had invested in the property with the expectation that it could prepay its mortgage after twenty years without HUD approval, and that the government's action had breached these reasonable, investment-backed expectations. App. at 76a.

The Federal Circuit overruled this careful and detailed application of *Penn Central*'s regulatory takings calculus, remanding for consideration of irrelevant factors gleaned by the appellate panel from precedents that did not involve *Penn Central* claims, and without reference to contrary authority from this Court. App. at 2a (incorporating by reference *Cienega X*). The Federal Circuit's interpretation of *Penn Central* guts that landmark decision of any further significance in takings law, and eliminates temporary regulatory takings as a viable cause of action. Review should be granted to establish uniformity among the circuit courts of appeal in their interpretation of this Court's takings jurisprudence.

A. *Cienega X*'s Holding That the Repeal of LIHPRHA's Prepayment Ban May Offset the Government's Liability for a Taking Repudiates *First English* and Eviscerates *Penn Central* as a Deterrent to Predatory Regulation

Petitioner's *Penn Central* claim alleges a temporary, partial taking. This Court recognizes that the government retains the option to rescind an unconstitutional regulation at any time, converting it from a permanent to a temporary taking. *First English*, 482 U.S. at 321. This observation was

reiterated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992):

> Of course, the State may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation.

Id. at 1030 n.17. But this Court has never suggested that rescinding a regulation eliminates the government's liability for compensation during the time the unlawful measure was in effect.

Nevertheless, in *CCA Associates* the Federal Circuit remanded partly on the grounds that "existing takings law requires consideration of the duration of the legislation as part of the takings analysis"—i.e., to determine whether liability for a taking has been incurred, rather than to determine the amount of compensation due. App. at 132a, 2a. In holding that there might be no liability under *Penn Central* because property owners may "only" have been subjected to a nineteen to twenty-seven month taking, *id.*, the Federal Circuit would obviate the very concept of temporary taking. Having found the *Penn Central* factors were met for the time ELIHPA and LIHPRHA were in existence, the Court of Federal Claims' opinion in *Cienega Gardens v. United States (Cienega IX)*, 67 Fed. Cl. 434 (2005), clearly establishes liability for just compensation over this period. Reversal of the Federal Circuit on this point is imperative to preserve any role for *Penn Central* as a deterrent to predatory regulations. If takings liability can be evaded by the simple expedient of repealing offending measures after litigation commences, such unconstitutional enactments may multiply without limit.

B. Measuring the Economic Impact of Land-Use Regulations Against the Lifetime Value of Real Property Would Render *Penn Central*—and the Very Concept of Temporary Takings—a Mere Curiosity

In a straightforward application of *Penn Central*, the Court of Federal Claims determined that Petitioner had suffered a severe economic impact from the application of ELIHPA and LIHPRHA to its property. App. at 76a. The Federal Circuit set aside this determination under *Cienega X*, holding that the economic impact prong of *Penn Central* must be evaluated by the regulation's reduction in the value of real property over its entire expected life, i.e., to infinity. App. at 122a, 2a. This remarkable error, if allowed to stand, would erase this Court's jurisprudence of temporary regulatory takings, render *Penn Central* a curiosity, and reduce the class of compensable takings to those that fit within the narrow categorical rules of *Lucas* or *Loretto*.

The Federal Circuit based this part of its ruling on *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), which did not involve a *Penn Central* claim. Those plaintiffs alleged a deprivation of all economically viable use of their land, resulting in a categorical taking under *Lucas*. *Id.* at 320. Within that limited context, the *Tahoe-Sierra* Court held the landowners must show a loss of the full value of their property in perpetuity. *Id.* at 334-35.

In a gross misreading of *Tahoe-Sierra*, *Cienega X* extends this holding to partial takings, stating "the necessity of considering of the overall [e.g., lifetime]

value of the property was explicitly confirmed in the temporary regulatory takings context." *Cienega X*, App. at 119a (citing *Tahoe-Sierra*, 535 U.S. at 331). If liability for a *Penn Central* taking required a significant economic impact on the value of real property measured over its entire useful life, a reduction in the financial rate of return over the effective duration of a regulation could never effect a taking. Yet this Court has frequently noted that an inadequate return is part of a taking analysis in the context of regulated utilities and other commercial enterprises. *See, e.g., Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). *Penn Central* itself absolved the local government of takings liability in part because of its evaluation that the plaintiffs' railroad terminal could "be regarded as capable of earning a reasonable return" on the owners' investment. *Penn Central*, 438 U.S. at 129, 136.

The decision below requires review by this Court to explicate the relationship between *Penn Central* and *Tahoe-Sierra*, and to clarify that the economic impact prong of the former decision is unaffected by the analysis of *Lucas* claims set forth in the latter.

C. Offsetting Incidental Governmental "Benefits" Against Liability for a Taking Directly Conflicts with the *Suitum* Concurrence and Ignores the Indeterminancy Surrounding This Aspect of *Penn Central*

The most astounding line in *Cienega X* is the majority's assertion that "[t]he Supreme Court in *Penn Central* ***clearly held*** that offsetting benefits must be accounted for as part of the takings analysis itself." *Cienega X*, App. at 123a (emphasis added; citation

omitted). This precise issue was extensively—albeit inconclusively—argued before this Court ten years after *Penn Central*, in *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, a case not mentioned in the Federal Circuit's opinion.

Although *Suitum* was decided on ripeness grounds, the parties briefed and argued the question of whether the availability of transferable development rights (TDRs) should mitigate the defendant agency's liability for a taking, or offset the amount of just compensation due. *See Suitum v. Tahoe Reg'l Planning Agency*, No. 96-243, 1997 WL 87090 (U.S. Feb. 26, 1997) (oral argument); Petitioner's Reply Brief, No. 96-243, 1997 WL 47628, at *17 (U.S. Feb. 5, 1997) ("Even a value-based takings inquiry, moreover, must be directed to the regulation's effect on the inherent utility of the land itself, *not* to the purported value of unrelated assets . . . . TRPA's claim that any resale value of its credits should offset the agency's liability for a taking rests entirely on a mistaken reading of *Penn Central*."). As a result, three *Suitum* Court Justices filed a concurring opinion squarely contrary to *Cienega X*'s interpretation of *Penn Central*:

> Considering in the takings calculus the *market* value of TDRs is contrary to the import of a whole series of cases, before and since, which make clear that the relevant issue is the extent to which use or development of the land has been restricted. Indeed, it is contrary to the whole principle that land-use regulation, if severe enough, can constitute a taking which must be *fully* compensated.

Suitum, 520 U.S. at 749 (Scalia, J., concurring in part and concurring in the judgment). Because *Suitum* was decided on ripeness grounds, the question of the proper treatment of governmental "benefits" bestowed coincidentally with a taking was reserved for another day:

> While the pleadings raise issues about the significance of the TDR's both to the claim that a taking has occurred and to the constitutional requirement of just compensation, we have no occasion to decide, and we do not decide, whether or not these TDR's may be considered in deciding the issue whether there has been a taking in this case, as opposed to the issue whether just compensation has been afforded for such a taking.

Suitum, 520 U.S. at 728. This Court ought to resolve this vital question. As the Court of Federal Claims noted in *Cienega IX*, the Federal Circuit's position on this point would "enable the government to take property with impunity, so long as it offered a modicum of recompense by statutory action." *Cienega IX*, 67 Fed. Cl. at 470. This is precisely the outcome foreseen by the *Suitum* concurrence, and one that only a decisive ruling by this Court can forestall.

III

THE DECISION BELOW HAS SEVERE IMPLICATIONS BEYOND THIS CASE

A. If Allowed To Stand, the Decision Below Will Have a Chilling Effect on Affordable Housing Availability

The decision below discourages investors from entering the affordable housing market because of the risk of barriers to freely exiting the market.

This nation needs more affordable housing. Twenty-two percent of its thirty-four million renters pay half or more of their income for rent. Walter Leginski, U.S. Dep't of Health & Human Serv., *2007 National Symposium on Homelessness Research: Historical and Contextual Influences on the U.S. Response to Contemporary Homelessness* 1-26 (2007).[4] In 2003, affordable housing units were available to only twenty-two percent of extremely low-income renters. *Id.* Only an increase in the supply of affordable housing can alleviate this severe shortage.

There are many impediments negatively affecting the entry of investors into the affordable housing market. State and local land use restrictions, such as restrictive zoning and unrealistically stringent environmental regulations, drive up the cost of housing, as do exorbitant exactions imposed on developers. The decision below only adds to these existing barriers to the creation of affordable housing.

Taking good-faith investors' investment-backed expectations and property without just compensation

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[4] *Available at* http://aspe.hhs.gov/hsp/homelessness/symposium07/leginski/report.pdf (last visited Nov. 12, 2008).

will deter future private investment in affordable housing. The trial court recognized the pre-payment option as a major incentive for new affordable housing creation. App. at 56a. Investors accepted the offer, building and increasing the supply of affordable housing—serving the government's goal of ensuring its citizens have homes.

The risk that the government may unilaterally change the rules, forcing investors to remain as affordable housing providers indefinitely, will have a chilling effect on future investment in this sector. Review is necessary to ensure that private investors are not driven away from the affordable housing market altogether.

B. Denial of Review Will Signal State and Local Governments That They May Severely Restrict Traditional Private Property Rights on the Basis of "Voluntary" Consent

Denial of review will affect the rights of private property owners across the country. State and local governments may see denial as a signal that they too may take private property rights without compensation. More particularly, these entities may see denial as authorization for the continued physical invasion of mobile home park owners' private property without needing to pay just compensation.

Mobile home parks are a source of affordable housing. In California, a recent trend in local governments is to implement mobile home park "condominium conversion" ordinances. *See, e.g.*, Santa Cruz County Code §§ 13.30.010-13.30.060 (implementing mobile home park conversion

ordinance); Santa Rosa City Code §§ 19-76.010-19-76.030 (same); Sonoma County Code §§ 25-39.7 (same). These ordinances prevent mobile home park owners from initiating the conversion of their parks into resident-owned communities without permission from their current renters. Other states are considering similar ordinances. *See, e.g.*, Pierce County Council Resolution No. R2008-118 (2008) (Washington State Pierce County Ordinance).[5]

Such ordinances, ostensibly preserving rent-control restrictions, prevent mobile home park owners from freely subdividing and selling their property to their tenants, and from excluding others from their property, without just compensation—just as the federal government appropriated those same rights from CCA Associates through the enactment of LIHPRHA. To sell his own land, the owner must first obtain the permission of a majority or super-majority of his tenants. The mobile home park owner's current tenants become *de facto* agents of the state, "requir[ing] the landowner to submit" to their occupation of his property as long as they want—potentially forever. *Yee*, 503 U.S. at 527. Moreover, neither the tenants, *de facto* agents of their governments, nor the governments permitting this unwanted, continued physical invasion are currently willing to comply with the constitutional mandate of just compensation for this appropriation of a mobile home park owner's property rights.

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[5] *Available at* http://srch.mrsc.org:8080/sampledocs/template.htm?view=mainresults&username=ords&password=ords&s_action=newSearch&s_type=all&s_terms=Mobile+home+park+conversion (last visited Nov. 12, 2008).

Denial of review may signal local and state governments that they can justify the removal of certain sticks from the bundle of private property rights—the right to alienate and the right to exclude others—without compensation. These governments will follow the lower courts' logic: once a landowner chooses a specific use for his property—here, a mobile home park—a *per se* taking will never result from a government-mandated occupation or possession of the property that is consistent with that use. *Cf. Cienega Gardens v. United States*, 33 Fed. Cl. at 214-17. They will use denial of certiorari as support for this perversion of private property rights.

Review is necessary so this Court may affirm that when a physical invasion of land is countenanced by the government, this taking must be compensated, whether the *Loretto per se* physical takings test or *Penn Central ad hoc* takings test applies.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

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Respectfully submitted,

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